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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 36

ALLEGHANY CORPORATION, ET AL., APPELLANTS,

vs.

BRESWICK & CO., ET AL., AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, ETC.

No. 82

BAKER, WEEKS & CO., ET AL., APPELLANTS,

vs.

BRESWICK & CO., ET AL.

No. 114

INTERSTATE COMMERCE COMMISSION, APPELLANT

vs.

BRESWICK & CO., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 36—FILED FEBRUARY 15, 1936
PROBABLE JURISDICTION NOTED APRIL 21, 1936

No. 82—FILED MAY 7, 1936
PROBABLE JURISDICTION NOTED OCTOBER 5, 1936

No. 114—FILED MAY 25, 1936
PROBABLE JURISDICTION NOTED OCTOBER 5, 1936

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 101-114

BRESWICK & COMPANY, ET AL., Plaintiffs

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., Defendants

NOTICE OF APPEAL

BY THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed March 26, 1956

I

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on December 23, 1955, setting aside orders of the Interstate Commerce Commission, and from the order entered on January 27, 1956, denying a motion for a new trial.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The Clerk is requested to prepare no transcript of the record herein, for transmission to the Clerk of the Supreme Court, in addition to that already requested by the defendant Alleghany Corporation.

[fol. 2] III

The following questions are presented by this appeal:

1. Whether the district court erred in holding that the appellees, as owners of common stock of Alleghany Corporation, had standing to challenge orders issued by the

Interstate Commerce Commission under Sections 5 and 20a of the Interstate Commerce Act.

2. Whether, in approving a merger of two companies already controlled by New York Central and through it by Alleghany Corporation, the Commission was authorized by Section 5(3) to provide that Alleghany Corporation should be considered as a carrier for specified purposes.

3. Whether the district court erred in holding that the acquisition by a person not a carrier of control of an integrated railroad system which is composed of two or more railroad companies, involves an acquisition by such person of control of two or more carriers which requires approval of the Commission under Section 5(2).

4. Whether the district court erred in holding that the Commission's conclusion that Alleghany Corporation controlled New York Central could not stand because

(a) neither the Commission's findings nor the evidence support that conclusion;

(b) the Commission failed to hold a hearing as to whether such control existed;

5. Whether a three-judge court convened under the Urgent Deficiencies Act (28 U. S. C. 1337, 2321-2325) possesses jurisdiction to enjoin an asserted violation of the Investment Company Act.

[fol. 3] 7. Whether the district court erred in setting aside the Commission's orders determining that Alleghany should be considered as a carrier pursuant to Section 5(3) and authorizing its issuance of new preferred stock.

Robert W. Ginnane, General Counsel, Leo H. Pou, Associate General Counsel, Attorneys for Interstate Commerce Commission, Defendant.

[fols. 4-5] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY ALLEGHANY CORPORATION TO THE SUPREME COURT OF THE UNITED STATES—Filed January 31, 1956

I. Notice is hereby given that Alleghany Corporation, an intervening defendant above named, hereby appeals to the Supreme Court of the United States from each and every part of the final judgment and injunction entered in this action on December 23, 1955, which, amongst other things, (1) in part, enjoined, set aside, annulled and voided orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, entered in Finance Docket Nos. 14692 and 18656, and (2) enjoined, set aside, annulled and suspended orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket 18866, and (3) enjoined Alleghany Corporation, its transfer agents, officers, directors, servants and employees, from taking any steps in connection with or in furtherance of issuance of 6% convertible preferred stock in exchange [fol. 7] for 5½% preferred stock, or for any other purpose, or the transfer thereof; and from the orders denying reargument entered in this action on January 27, 1956.

This appeal is taken pursuant to 28 U. S. C., Sections 1253 and 2101(b).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Final judgment in this cause made and entered December 23, 1955.

1(a). Memorandum order of the United States District Court made and entered in this cause January 27, 1956, denying motions of Alleghany under F. R. C. P. 59.

1(b). Memorandum order of the United States District Court made and entered in this cause January 27, 1956,

denying motion of Baker, Weeks & Co., et al., for reargument.

1(c). Second Supplemental Opinion of January 27, 1956, clarifying footnote in main opinion of November 18, 1955. (see 10 below)

2. Order of the United States District Court in this cause granting plaintiffs interlocutory injunction made July 26, 1955, and entered July 27, 1955.

3. Order of the United States District Court in this cause, per Dimock, J., made June 23, 1955, restraining Alleghany Corporation (hereinafter "Alleghany"), its transfer agents, officers, directors, servants and employees, and each of them, from issuing, distributing or transferring any of the 6% convertible preferred stock of Alleghany, which was the subject of the application before the Interstate Commerce Commission (hereinafter "I. C. C.") in Finance Docket No. 18866, or attempting to do so until the hearing and determination of the then pending motion [fol. 8] for a preliminary injunction against an order of the I. C. C. dated May 24, 1955, in Finance Docket No. 18656.

4. Order in this cause made July 26, 1955 of the United States District Court, per Honorable Carroll C. Hincks, Circuit Judge, and per Honorable Edward J. Dimock, District Judge, denying, because the said two Judges could not agree, the application of intervening defendant, Alleghany, for supersedeas pending appeal and for a stay.

5. Order in this cause of the Supreme Court of the United States, per Mr. Justice Harlan, made August 9, 1955, together with copy of supersedeas bond on appeal filed by intervening defendant, Alleghany.

6. Six orders of the United States District Court made and entered in this cause December 23, 1955:

a. Granting plaintiffs' motion for an order permitting plaintiffs to file and serve a supplemental complaint.

b. Granting in part and denying in part defendant Alleghany's motion for an order striking certain matter from the original complaint; and granting said defendant's motion for leave to amend its answer so as to plead three additional defenses.

c. Granting plaintiffs' motion for an order further amending the original and supplemental complaints; granting the motion of Adelaide Neuwirth for an order granting her leave to intervene as a party defendant; granting the motion of Myron Neisloss for an order granting him leave to intervene on behalf of himself and other stockholders similarly situated; granting the motion of defendant Shufro to intervene in behalf of his firm and in behalf of all holders of the 6% convertible preferred stock of defendant Alleghany similarly situated; amending the title of the action; and denying defendant Shufro's motion for an order vacating the temporary injunction dated July 26, 1955, and requiring plaintiffs to post bond indemnifying said Shufro and others.

d. Denying defendant Alleghany's motion for orders striking certain matter from the supplemental complaint, dismissing plaintiffs' amended and supplemental complaint, granting said defendant judgment on the pleadings, and awarding said defendant summary judgment.

[fol. 9] e. Granting in part plaintiffs' motion for an order modifying in certain respects the order of this Court dated September 1, 1955, granting leave to Salwyn Shufro to intervene.

f. Denying, without prejudice to renewal if the circumstances require it, plaintiffs' motion for an order adjudging certain defendants and other persons to be in contempt of the order dated July 26, 1955 granting a preliminary injunction.

7. Order of the United States District Court made and entered in this cause September 1, 1955, granting leave to Salwyn Shufro to intervene.

8. Order of the United States District Court made and entered in this cause on January 10, 1956, amending the order described in 6c. above.

9. Opinion of Mr. Justice Harlan, dated August 3, 1955.

10. Opinion rendered November 18, 1955 of the United States District Court by Honorable Jerome N. Frank, Circuit Judge, Honorable Edward J. Dimock and Honorable Lawrence E. Walsh, District Judges.

11. Supplemental opinion rendered December 23, 1955 of Honorable Jerome N. Frank, Circuit Judge, and Honorable Edward J. Dimock and Honorable Lawrence E. Walsh, District Judges.

12. Opinion of the United States District Court rendered July 21, 1955 on interlocutory injunction, per Honorable Edward J. Dimock, and concurred in by Honorable Lawrence E. Walsh, District Judges, together with the dissenting opinion of Honorable Carroll C. Hincks, Circuit Judge.

13. Memorandum opinion of Honorable Edward J. Dimock, District Judge, dated July 26, 1955, on intervening defendant Alleghany's motion for supersedeas pending appeal from interlocutory injunction, and for a stay.

[fol. 10] 14. Memorandum opinion of Honorable Carroll C. Hincks, Circuit Judge, dated July 26, 1955, on defendant Alleghany's motion for supersedeas pending appeal from interlocutory injunction and for a stay.

15. Notice of appeal from interlocutory injunction of intervening defendant Alleghany to the Supreme Court of the United States.

16. Notice of appeal to the Supreme Court of the United States from interlocutory injunction of Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co.

17. Plaintiff's original complaint, together with the following exhibits annexed thereto:

a. A—Statement of the Protective Committee for Common Stockholders of Alleghany.

b. B-1—Report of the I. C. C., dated May 24, 1955, in Finance Docket Nos. 18656 and 14692.

c. B-2—Order of the I. C. C., dated May 24, 1955, in Finance Docket Nos. 18656 and 14692.

d. B-3—Report of the I. C. C., Division 4, dated March 2, 1955, in Finance Docket Nos. 18656 and 14692.

e. B-4—Order of the I. C. C., Division 4, dated March 2, 1955, in Finance Docket Nos. 18656 and 14692.

f. C-1—Petition of Breswick & Co., dated February 4, 1955, to the I. C. C. for leave to intervene in Finance Docket Nos. 18656 and 14692.

g. C-2—Motion of Breswick & Co. to the I. C. C.

for denial of the application of Alleghany in Finance Docket Nos. 18656 and 14692.

h. D-1—Amended petition of Breswick & Co., dated February 18, 1955, to the I. C. C. for leave to intervene in Finance Docket Nos. 18656 and 14692, and Exhibits A, B and C annexed there to.

[fol. 11] i. D-2—Motion of Breswick & Co. to the I. C. C. to dismiss the application of Alleghany in Finance Docket Nos. 18656 and 14692.

j. E—Petition of Lewis D. Gilbert, John Gilbert and Randolph Phillips, dated March 23, 1955, to the I. C. C., for leave to intervene in Finance Docket No. 18866, and for rehearing and reconsideration in Finance Docket Nos. 18656 and 14692.

k. F—Amended petition of Breswick & Co., Lewis D. and John Gilbert and Randolph Phillips, dated April 8, 1955, to the I. C. C., for leave to intervene in Finance Docket Nos. 14692, 18656 and 18866, and for reconsideration in Finance Docket Nos. 14692 and 18656, and exhibit annexed thereto.

18. Order of the United States District Court, dated June 15, 1955, convening a three-judge court in this cause and bringing on plaintiffs' application for interlocutory injunction.

19. Affidavit of Randolph Phillips, affirmed June 15, 1955, upon which the order described in 18 above was procured, together with the following exhibits annexed thereto:

a. G—Application of Alleghany, dated September 17, 1954, to the I. C. C. under Section 5(2) of the Interstate Commerce Act, in Finance Docket Nos. 14692 and 18656.

b. H—Memorandum of Securities and Exchange Commission, dated September 14, 1954, filed with the I. C. C. in Finance Docket No. 14692.

c. I—Supplemental memorandum of Securities and Exchange Commission, dated December 14, 1954, filed with the I. C. C. in Finance Docket No. 14692.

d. J—Petition of Securities and Exchange Commission, dated April 1, 1955, to the I. C. C., for reconsideration in Finance Docket No. 14692.

20. Notice, dated June 16, 1955, of the entry of the order described in 18 above given by the Clerk of the United States District Court, Southern District of New York, to the Attorney General of the United States, the United [fol. 12] States Attorney for the Southern District of New York, and the I. C. C., pursuant to 28 U. S. C., § 2284.

21. Motion of Alleghany, dated June 21, 1955, for leave to intervene and serve answer in this cause.

22. Plaintiff's notice of rejection, dated June 23, 1955, of Alleghany's motion described in 21 above, together with the affidavit of service thereof by mail on June 24, 1955 of Mary J. Groen, sworn to June 24, 1955.

23. Affidavit of George Brussel, Jr., sworn to June 23, 1955 upon which the restraining order against Alleghany (3 above) was granted.

24. Order to show cause of Alleghany obtained June 27, 1955, for leave to intervene in this cause, and for other relief.

25. Affidavit of David Hartfield, Jr. sworn to June 27, 1955 upon which the order to show cause (24 above) was procured.

26. Order to show cause of The New York Central Railroad Company obtained June 27, 1955, for leave to intervene in this cause.

27. Affidavits of Harold McLean sworn to June 24, 1955 and June 27, 1955, upon which the order to show cause (26 above) was procured.

28. Order to show cause obtained June 27, 1955 by Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., for leave to intervene, and for other relief.

29. Affidavit of Charles H. Blatt, sworn to June 27, 1955, upon which the order to show cause (28 above) was procured.

[fol. 13] 30. Affidavit of David W. Wallace, sworn to June 27, 1955, submitted in opposition to plaintiffs' application for preliminary injunction, together with the following exhibits to said affidavit:

a. Order of the I. C. C., Division 4, dated March 2, 1955, in Finance Docket Nos. 18656 and 14692.

b. Further order of the I. C. C., Division 4, dated March 2, 1955, in Finance Docket Nos. 14692 and 18656.

c. Order of the I. C. C., dated May 24, 1955, in Finance Docket Nos. 18656 and 14692.

d. Report of the I. C. C., Division 4, dated March 2, 1955, in Finance Docket No. 18656, which said report also embraces Finance Docket No. 14692.

e. Report of the I. C. C., dated May 24, 1955, in Finance Docket No. 18656.

f. Exchange Offer of Alleghany of its 6% Convertible Preferred Stock for Alleghany's Cumulative 5½% Preferred Stock, Series A, dated February 10, 1955.

g. Report of the I. C. C., Division 4, dated May 26, 1955, in Finance Docket No. 18866.

h. Order of the I. C. C., dated May 26, 1955, in Finance Docket No. 18866.

i. Order of the I. C. C., dated April 20, 1955, in Finance Docket No. 18866.

j. Order of the I. C. C., dated June 22, 1955, in Finance Docket No. 18866.

31. Supplemental affidavit of Randolph Phillips, affirmed June 28, 1955, in support of plaintiffs' motion for a preliminary injunction, together with the following exhibit annexed thereto:

a. K—Annual report of Alleghany for 1954.

32. Affidavit of Randolph Phillips, affirmed June 29, 1955, submitted to correct typographical errors in his affidavit affirmed June 28, 1955 (31 above).

[fol. 14] 33. Answer of intervening defendant, The New York Central Railroad Company, to plaintiffs' original complaint.

34. Order of the United States District Court in this cause, dated June 30, 1955, granting motions of Alleghany, The New York Central Railroad Company and Gruss & Co. for leave to intervene, and other relief.

35. Order to show cause obtained by plaintiffs July 8, 1955, for leave to serve a supplemental complaint directed to orders of the I. C. C., dated May 26, 1955 and June 22, 1955, in Finance Docket No. 18866, and for other relief.

36. Affidavit of Randolph Phillips affirmed July 7, 1955, upon which the order to show cause (35 above) was obtained.

37. Plaintiffs' proposed supplemental complaint attached to the order to show cause obtained by plaintiffs (35 above).

38. Order to show cause obtained by Samuel A. Mehlman, July 12, 1955, for leave to intervene, and for other relief.

39. Affidavit of Samuel A. Mehlman, sworn to July 11, 1955, upon which the order to show cause (38 above) was procured.

40. Affidavit of George Brussel, Jr., sworn to July 13, 1955, in opposition to the application of Samuel A. Mehlman for leave to intervene, and for other relief.

41. Affidavit of David W. Wallace, sworn to July 13, 1955, together with the exhibits attached thereto consisting of:

[fol. 15] a. Proxy material sent to the stockholders of Alleghany under date of January 14, 1955.

b. Letter dated July 11, 1955 from Theo. Zander.

42. Affidavit of Charles H. Blatt, sworn to July 13, 1955, in opposition to plaintiffs' application (35 above) to serve a proposed supplemental complaint.

43. Stipulation entered into in open court on July 13, 1955.

44. Answer of Alleghany to plaintiffs' original complaint.

45. Answer of Samuel A. Mehlman to plaintiffs' original complaint.

46. Answer of Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., to plaintiffs' original complaint.

47. Answer of I. C. C. to plaintiffs' original complaint.

48. Order to show cause obtained July 21, 1955 by Alleghany directed to the United States District Court for an order granting supersedeas pending appeal from order granting interlocutory injunction and for a stay.

49. Affidavit of David Hartfield, Jr., sworn to July 21,

1955, on which the order to show cause (48 above) was procured.

50. Affidavit of George Brussel, Jr., sworn to July 26, 1955, in opposition to the motion of Alleghany (48 above).

51. Answer of United States of America to plaintiffs' original complaint.

[fol. 16] 52. Motion of defendant Alleghany in the Supreme Court of the United States for supersedeas pending appeal to the Supreme Court of the United States and for a stay of the preliminary injunction (2 above), together with affidavit of David Hartfield, Jr., sworn to July 25, 1955, annexed thereto.

53. Affidavit of Randolph Phillips, affirmed August 1, 1955, in opposition to motion of Alleghany for a stay pending appeal from interlocutory injunction and for supersedeas (52 above).

54. Affidavit of George Brussel, Jr., sworn to August 1, 1955, in opposition to motion of Alleghany for a stay pending appeal (52 above), together with the following exhibits attached thereto:

a. Statement of the Protective Committee for Common Stockholders of Alleghany.

b. Letter dated July 1, 1955 from George Brussel, Jr., to Judges Hincks, Dimock and Walsh.

c. Letter dated July 14, 1955 from George Brussel, Jr. to Judges Hincks, Dimock and Walsh.

d. Affidavit of George Brussel, Jr., sworn to July 26, 1955.

55. Affidavit of Harold H. Levin, sworn to July 28, 1955, in support of motion of Alleghany for a stay pending appeal (52 above).

56. Motion of Securities and Exchange Commission for leave to file memorandum and to participate *amicus curiae* in oral argument before Mr. Justice Harlan, together with the memorandum of Securities and Exchange Commission submitted on argument.

57. Cross designation of plaintiffs of record on appeal from preliminary injunction to the Supreme Court of the United States, dated August 18, 1955.

[fol. 17] 58. Order to show cause obtained by Salwyn

Shufro dated August 18, 1955, for an order permitting Salwyn Shufro to intervene, and for other relief, together with the affidavit of Salwyn Shufro, sworn to August 17, 1955, in support thereof, and the proposed answer of Salwyn Shufro annexed thereto.

59. Order to show cause, together with the supporting affidavit of David Hartfield, Jr., sworn to August 19, 1955, annexed thereto, obtained by Alleghany August 19, 1955, for an order striking various matters from plaintiffs' original complaint and permitting Alleghany to amend its answer.

60. Answer of I. C. C. to plaintiffs' proposed supplemental complaint.

61. Motion of plaintiffs, together with supporting affidavit of George Brussel, Jr., sworn to August 29, 1955, for leave to plaintiffs to further amend their original and their proposed supplemental complaint.

62. Amended answer of Alleghany to plaintiffs' original complaint and to plaintiffs' proposed supplemental complaint.

63. Affidavit of David Hartfield, Jr., sworn to August 30, 1955, in opposition to plaintiffs' motion (61 above) to further amend both their original and supplemental complaint, together with exhibit attached thereto, being a letter, dated August 30, 1955, from Philip A. West.

64. Motion, dated September 1, 1955, of Alleghany to strike various matter from plaintiffs' proposed supplemental complaint, and for other relief.

65. Answer of The New York Central Railroad Company to plaintiffs' proposed supplemental complaint.

[fol. 18] 66. Motion of United States of America and I. C. C., dated September 1, 1955, to quash subpoena duces tecum served by plaintiffs upon I. C. C.

67. Order to show cause obtained by Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman and Edward Gornish September 1, 1955, for an order permitting them to intervene, together with the affidavits of Hugh B. Baker sworn to September 1, 1955, Oscar Gruss sworn to September 1, 1955, and Edward Gornish sworn to August 31, 1955, in support thereof, and their proposed answer annexed thereto.

68. Answer of Joseph S. Gruss, et al., to plaintiffs' proposed supplemental complaint.

69. Answer of Samuel A. Mehlman to plaintiffs' proposed supplemental complaint.

70. Answer of United States of America to plaintiffs' proposed supplemental complaint.

71. Notice of motion, dated September 2, 1955, by plaintiffs for an order modifying the order granting intervention to Salwyn Shufro (7 above) together with the affidavit of George Brussel, Jr., sworn to September 2, 1955, in support thereof.

72. Answer of Salwyn Shufro to plaintiffs, original complaint.

73. Answer of Salwyn Shufro to plaintiffs' proposed supplemental complaint.

74. Order to show cause obtained September 6, 1955, of Myron Neisloss for leave to intervene.

75. Petition of Myron Neisloss, verified September 6, 1955, upon which the order to show cause (74 above) was procured.

[fol. 19] 76. Order to show cause obtained by plaintiffs September 9, 1955, why defendant Alleghany and certain of its officers should not be punished for contempt of the preliminary injunction (2 above).

77. Affidavit of Randolph Phillips, affirmed September 9, 1955, upon which the order to show cause (76 above) was obtained, together with the following exhibits annexed thereto:

a. Notice, dated August 18, 1955, to the stockholders of Alleghany of a hearing in the Supreme Court of the State of New York, County of New York, on the approval of the proposed settlement of certain stockholders' derivative actions pending therein.

b. Original complaint in *Breswick, et al.*, against *Briggs, et al.*, Civil Action No. 98-371, pending in the United States District Court, Southern District of New York.

78. Answer of Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman and Edward Gornish to plaintiffs' original complaint.

79. Answer of Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman and Edward Gornish to plaintiffs' proposed supplemental complaint.

80. Affidavit of Adolphus Ragan, sworn to September 13, 1955, in opposition to the intervention of Myron Neisloss and in opposition to plaintiffs' proposed further amendment of their original and proposed supplemental complaint.

81. Affidavit of Peter I. B. Lavan, sworn to September 13, 1955, in opposition to the intervention of Myron Neisloss and in opposition to plaintiffs' proposed further amendment of their original and proposed supplemental complaint.

[fol. 20] 82. Notice of settlement, dated September 20, 1955, of order granting intervention to Adelaide Neuwirth and proposed order, affidavit of Alexander Kahan sworn to September 19, 1955 in support thereof, and proposed answer of Adelaide Neuwirth annexed thereto.

83. Offer of proof submitted on behalf of Joseph S. Gruss, et al., by letter to Court dated September 20, 1955.

84. Order to show cause obtained by defendant Alleghany December 13, 1955, why said defendant's proposed decree attached thereto should not be entered, and the affidavit of David Hartfield, Jr., sworn to December 9, 1955, in support thereof, together with the following exhibits annexed thereto:

a. Proposed decree of Alleghany.

b. Memorandum opinion of Harlan, J., dated August 3, 1955.

c. Order of the Supreme Court of the United States, per Harlan, J., made August 9, 1955.

d. Supersedeas bond on appeal filed by Alleghany.

85. Order to show cause obtained by Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman and Edward Gornish December 16, 1955, why an order should not be made directing reargument, and for other relief, and the affidavit of Edward M. Garlock, sworn to December 16, 1955, in support thereof.

86. Plaintiffs' proposed final judgment.

87. Affidavit of George Brussel, Jr., sworn to December 20, 1955, on settlement of final judgment.

[fol. 21] 88. Affidavit of Randolph Phillips, affirmed December 21, 1955, on settlement of final judgment, together with the following exhibits annexed thereto:

a. Certified copy of excerpt from minutes of meeting of the board of directors of Alleghany held January 19, 1954.

b. Extract from stenographic transcript, testimony of David W. Wallace on November 23, 1955, before Honorable Robert J. Fitzsimmons, Referee, in *Zenn, et al.*, against *Anzalone, et al.*, in the Supreme Court of the State of New York, County of New York.

89. Affidavit of Henry J. Friendly, sworn to December 21, 1955, on settlement of final judgment, and the exhibit annexed thereto being letter, dated December 9, 1955, from Alleghany to Securities and Exchange Commission.

90. Stenographic transcript of proceedings of June 24, 1955, before Judges Dimock and Walsh.

91. Stenographic transcript of proceedings of July 13, 1955, before Judges Hincks, Dimock and Walsh.

92. Stenographic transcript of proceedings of August 1, 1955, before Mr. Justice Harlan.

93. Stenographic transcript of proceedings of September 14 and 15, 1955, before Judges Frank, Dimock and Walsh.

94. Motion of Alleghany, pursuant to F. R. C. P. Rule 59, dated December 30, 1955, for an amendment of the judgment of the Court in this cause dated December 23, 1955 (1 above), or in the alternative for a new trial, together with the following exhibits filed with the Clerk of the United States District Court for the Southern District of New York:

a. Application to I. C. C. of The New York Central Railroad Company and Alleghany, dated December 16, 1954, for control of Boston & Albany Railroad Company, etc.

[fol. 22] b. Report of I. C. C. in Finance Docket 18789, embracing also Finance Docket 18790, decided March 22, 1955—*Boston & Albany Railroad Company, et al. Control.*

c. Order of I. C. C. in Finance Dockets 18789 and

18790 issued March 22, 1955, in *Boston & Albany Railroad Company, et al. Control.*

95. Application, dated September 17, 1954, to the I. C. C. of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Louisville and Jeffersonville Bridge and Railroad Company and Alleghany.

96. Supplemental application and attached supplemental exhibit to said application dated December 6, 1954.

97. Petition of Securities and Exchange Commission in Finance Docket 14692 for leave to intervene before I. C. C., dated September 20, 1954.

98. Memorandum of Securities and Exchange Commission in Finance Docket 14692 before the I. C. C., dated September 14, 1954, annexed to 114 below.

99. Memorandum of New York Central Railroad Company in Finance Docket No. 18656, dated October 14, 1954.

100. Reply of Alleghany in Finance Docket Nos. 14692 and 18656, dated October 14, 1954.

101. Petition of Sullivan & Huston in Finance Docket Nos. 14692 and 18656, dated November 26, 1954.

102. Reply of Alleghany to petition of Sullivan & Huston in Finance Dockets 14692 and 18656.

103. Petition of Securities and Exchange Commission in Finance Dockets 14692 and 18656 for leave to file supplemental memorandum, dated December 14, 1954.

104. Supplemental memorandum of Securities and Exchange Commission before the I. C. C. in Finance Dockets 14692 and 18656, dated December 14, 1954.

[fol. 23] 105. Reply of Alleghany to supplemental memorandum of Securities and Exchange Commission in Finance Dockets 14692 and 18656, dated December 31, 1954.

106. Petition for leave to intervene in Finance Docket 18656 of Lewis D. Gilbert and John Gilbert filed January 11, 1955, together with motion of Lewis D. and John Gilbert to dismiss for want of jurisdiction petition of Alleghany, and further together with the motion of Lewis D. and John Gilbert to deny the application of Alleghany.

107. Reply of Alleghany in Finance Docket Nos. 14692 and 18656, dated January 17, 1955, to the pleadings of Lewis D. and John Gilbert.

108. Petition of Breswick & Co. for leave to intervene,

dated February 4, 1955, in Finance Dockets 18656 and 14692.

109. Reply of Alleghany to petition to intervene of Breswick & Co. in Finance Docket Nos. 14692 and 18656, dated February 10, 1955.

110. Amended petition of Breswick & Co. of February 18, 1955 for leave to intervene, in Finance Dockets 18656 and 14692, together with attached motion of Breswick & Co. to dismiss the application of Alleghany, together with Exhibit A to said motion being an affidavit of Carl S. Breswick verified February 11, 1955; Exhibit B, copy of proxy statement for the proposed Alleghany-Young-Kirby ownership Board of Directors of the New York Central Railroad Company; and Exhibit C, copy of complaint in the United States District Court in the *Matter of Breswick & Co., et. and.*, v. *Briggs, et al.*; Civil Action No. 98-371.

[fol. 24] 111. Reply of Alleghany in Finance Docket Nos. 14692 and 18656 to amended petition of Breswick & Co. (110 above), and request for denial of same, dated February 24, 1955.

112. Petition for leave to intervene filed in Finance Docket Nos. 18866 and 14692 and 18656, together with application for rehearing and reconsideration of Lewis D. and John Gilbert and Randolph Phillips, dated March 23, 1955.

113. Opposition of Alleghany, dated April 1, 1955, to pleading of Lewis D. and John Gilbert and Randolph Phillips in Finance Docket Nos. 18866 and 14692 and 18656 (112 above).

114. Petition of Securities and Exchange Commission for reconsideration filed in Finance Docket Nos. 18656 and 14692, dated April 1, 1955.

115. Amended petition for intervention and reconsideration of Lewis D. and John Gilbert, Breswick & Co. and Randolph Phillips, dated April 8, 1955, in Finance Docket Nos. 18866, 14692 and 18656.

116. Reply of Alleghany, dated April 14, 1955, to the April 8th amended petition of Lewis D. and John Gilbert, Breswick & Co. and Randolph Phillips in Finance Dockets 18866, 14692 and 18656.

117. Letter of Wheeler & Wheeler of September 14, 1954 to I. C. C.

118. Application of Alleghany, dated February 16, 1955, in Finance Docket No. 18866, together with exhibits.

119. Report of Securities and Exchange Commission of October 4, 1945.

120. Order of Securities and Exchange Commission of October 4, 1945.

[fol. 25] 120A. SEC Order of October 18, 1954.

121. The following certified copies of papers filed with the I. C. C. in Finance Docket Nos. 14692, 18656 and 18866, which certified copies the I. C. C. will transmit directly to the Clerk of the Supreme Court of the United States, to wit:

a. Report of the I. C. C., dated June 5, 1945, in Finance Docket No. 14692.

b. Order of the I. C. C. of June 5, 1945, in Finance Docket No. 14692.

c. Exhibit B-3 to the application of Alleghany, dated September 14, 1955 (95 above), said exhibit being the annual report of Alleghany for the year ended December 31, 1953.

d. Order of the I. C. C. in Finance Dockets 14692 and 18656, dated December 20, 1954.

e. Order of I. C. C. in Finance Docket Nos. 14692 and 18656, dated January 7, 1955, denying intervention of Sullivan & Huston.

f. Order of I. C. C. in Finance Docket No. 18656, dated February 9, 1955, denying petition of Lewis D. and John Gilbert.

g. Order of I. C. C., Division 4, of February 15, 1955, in Finance Docket Nos. 18656 and 14692, denying the petition of Breswick & Co.

h. Order of I. C. C., Division 4, of March 2, 1955, dismissing amended petition of Breswick & Co. in Finance Dockets 14692 and 18656.

i. Application for rehearing and reconsideration filed by Lewis D. and John Gilbert and Breswick & Co., pleading jointly, in Finance Docket Nos. 14692 and 18656 of March, 1955.

j. Response of Alleghany to petition for reconsideration filed in Finance Docket Nos. 14692 and 18656 of

Lewis D. and John Gilbert and Breswick & Co., dated March 28, 1955.

k. Reply of Alleghany to petition of Securities and Exchange Commission for reconsideration filed in Finance Docket Nos. 18656 and 14692, dated April 13, 1955.

l. Reply of The New York Central Railroad, dated April 12, 1955, to petition of Securities and Exchange Commission in Finance Docket Nos. 14692 and 18656.

m. Letter of I. C. C. of September 21, 1954 to Mr. Edward K. Wheeler.

[fol. 26] n. Letter of November 10, 1954 to I. C. C. in Finance Docket No. 18656 of Alleghany signed by Burton K. Wheeler.

o. Letter of I. C. C. of November 22, 1954 to Edward K. Wheeler, Esq.

p. Letter of Wheeler & Wheeler of December 15, 1954 to Mr. Roger T. Boyden in Finance Dockets 14692 and 18656.

q. Letter of I. C. C. of December 22, 1954 to Burton K. Wheeler.

r. Letter of I. C. C. to Mr. Joseph B. Hyman and Mr. Randolph Phillips, dated April 6, 1955, in Finance Dockets 14692, 18656 and 18866.

s. Order of I. C. C. of April 20, 1955 in Finance Docket 18866, allowing intervention.

t. Petition for reconsideration in Finance Docket 18866 of Breswick & Co., Lewis D. and John Gilbert and Randolph Phillips, dated June 1, 1955.

u. Reply of Alleghany, dated June 10, 1955, to the petition for reconsideration of Breswick & Co., Lewis D. and John Gilbert and Randolph Phillips in Finance Docket 18866.

v. Notice to parties of I. C. C., dated June 8, 1955, in Finance Docket 18866.

w. Order of the I. C. C., dated June 22, 1955 in Finance Docket 18866.

x. Combined petition and supplementary petition for a declaratory order filed by New York Central System with I. C. C. during the proxy fight, dated April 6, 1954 and April 13, 1954.

y. Order dismissing New York Central's petitions for declaratory order (x above), dated May 18, 1954.

z. Letter of February 5, 1954 from the Chairman of the I. C. C. to Burton K. Wheeler.

aa. Letter of I. C. C. to United States District Court, dated November 10, 1955.

[fol. 27] bb. I. C. C. order to show cause in Finance Docket 14692, dated June 22, 1954, asking Alleghany to show cause why I. C. C.'s order of June 5, 1945 should not be terminated.

cc. Response of Alleghany, dated June 28, 1954, in Finance Docket 14692 to bb above.

dd. Second response of Alleghany to bb above, dated July 15, 1954.

ee. Order of I. C. C. in Finance Docket 14692 granting Alleghany's second response (dd above) of July 23, 1954, and ordering that action be withheld in regard to bb above for 60 days.

III. The following questions are presented by this appeal:

1. Whether the District Court correctly held that the Interstate Commerce Commission (hereinafter "I. C. C.") committed error (a) in asserting or continuing to assert pursuant to 49 U. S. C. 5(3) regulatory jurisdiction over Alleghany Corporation (hereinafter "Alleghany") and/or (b) in the administrative proceedings which gave rise to the orders relating to the continuation of Alleghany's status as being subject to I. C. C.'s regulation (hereinafter "status orders")?

2. Whether the District Court correctly held that I. C. C. committed error in making orders (hereinafter "preferred stock orders") which permitted Alleghany to issue shares of its newly authorized 6% convertible preferred stock in connection with the voluntary exchange of such stock for shares of its cumulative 5½% preferred stock, Series A, and to issue shares of its common stock upon conversion of such 6% convertible preferred stock?

[fol. 28] 3. May there be a review of, and/or do minority stockholders have standing to challenge, under 28 U. S. C.

§§ 1336, 2284, 2321 through 2325, inclusive, (a) the status orders, and/or (b) the preferred stock orders?

4. Whether, in all events, the District Court, convened as a statutory three-judge court to review orders of the I. C. C., erred by failing to limit its decree to enjoining the challenged orders and by broadening its decree to enjoin consummation of the exchange offer at vast damage to Alleghany and to its innocent stockholders?

5. Whether, in all events, the District Court erred in concluding that when a non-carrier not having control of a carrier acquires control of a single railroad system, I. C. C. as a prerequisite to subjecting such non-carrier to regulation pursuant to 49 U. S. C. 5(3) must find the non-carrier's control of the railroad system to be consistent with the public interest?

6. Does not 49 U. S. C. § 15(2), which provides that "all" orders of the I. C. C. "shall continue in force until its further order, or for a specified time, accordingly as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission * * *", apply to all orders of the I. C. C. made pursuant to Chapter 1 of the Interstate Commerce Act?

7. Can an ordering paragraph in one of the status orders under attack by plaintiffs, which paragraph purported to terminate an earlier adjudication by order as to Alleghany's status, be effective to nullify the earlier adjudication by order if the status order, of which said ordering paragraph was a part, is adjudicated to be a nullity?

[fols. 29-31] 8. In the absence of a further Securities Exchange Commission (hereafter S. E. C.) order, can an order of that Commission determining that Alleghany had ceased to be a registered investment company, which said order was issued pursuant to Section 8(f) of the Investment Company Act of 1940, (15 U. S. C., § 80a-8(f)) and which order provided that it "may be revoked, suspended or modified, after appropriate notice and opportunity for hearing", lose its efficacy without having been revoked, suspended or modified?

9. Did the Court err in enjoining, setting aside, annulling and voiding the status orders in so far as they related to Alleghany?

10. Did the Court err in enjoining, setting aside, annulling and suspending the preferred stock orders?

11. Did the Court abuse its discretion in granting interlocutory injunction?

12. Assuming that the preferred stock orders were a nullity, does such nullity render Alleghany's 6% convertible preferred stock void?

Dated: January 31, 1956.

David Hartfield, Jr., 14 Wall Street, New York 5, N. Y., Edward K. Wheeler, Southern Building, Washington 5, D. C., Attorneys for Alleghany Corporation.

[fols. 32-36] Proof of Service (omitted in printing)

[fol. 37] [File endorsement omitted]

In United States District Court for the Southern District of New York

[Title omitted]

Notice of Appeal by Joseph S. Gruss, et al., to the Supreme Court of the United States—Filed February 1, 1956

I. Notice is hereby given that Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., an intervening defendant above named, hereby appeal to the Supreme Court of the United States from each and every part of the final judgment and injunction entered in this action on December 23, 1955, which (1) in part, enjoined, set aside, annulled and voided orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, entered in Finance Docket Nos. 14692 and 18656, and (2) enjoined, set aside, annulled and suspended orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket 18866,

[fol. 38] and (3) enjoined Alleghany Corporation, its transfer agents, officers, directors, servants and employees, from taking any steps in connection with or in furtherance of issuance of 6% convertible preferred stock in exchange for 5½% preferred stock, or for any other purpose, or the transfer thereof.

This appeal is taken pursuant to 28 U. S. C., Sections 1253 and 2101(b).

II. The Clerk is not requested to prepare any transcript of the record in this cause other than that already requested by the defendant Alleghany Corporation.

III. The following questions are presented by this appeal:

1. Whether the District Court correctly held that the Interstate Commerce Commission (hereinafter "I. C. C.") committed error in assuming jurisdiction to make and in making orders (hereinafter "preferred stock orders") which permitted Alleghany Corporation (hereinafter "Alleghany") to issue shares of its newly authorized 6% convertible preferred stock in connection with the voluntary exchange of such stock for shares of its cumulative 5½% preferred stock, Series A, and to issue shares of its common stock upon conversion of such 6% convertible stock.

2. Whether the plaintiffs, as minority stockholders, have standing to challenge the orders herein enjoined and annulled by the District Court.

3. Whether, assuming plaintiffs' right to challenge the orders of the I. C. C., the District Court erred in enjoining said preferred stock orders, thus causing irreparable damage to Alleghany's innocent preferred stockholders.

[fols. 39-40] 4. Whether the District Court erred in holding that an earlier order of the I. C. C., pursuant to which Alleghany was designated a carrier, became ineffective by reason of changed circumstances despite the provisions of Section 15(2) of the Interstate Commerce Act (Title 49 USCA), which provides that orders of the I. C. C. shall continue in full force until a further order by the I. C. C. or until such order is set aside by a court of competent jurisdiction.

5. Whether the District Court committed an abuse of discretion in granting a preliminary injunction and a permanent injunction restraining the completion of Alleghany's offer to exchange new preferred stock for its old preferred stock.

Dated: February 1, 1956.

Proskauer, Rose, Goetz & Mendelsohn, By Harold H. Levin, a Member, Attorneys for intervening defendants Joseph S. Gruss, et al., doing business as Gruss & Co., Address: 300 Park Avenue, New York 22, N. Y.

[fols. 41-44] AFFIDAVIT OF SERVICE

(omitted in printing)

[fol. 45] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY BAKER, WEEKS & CO., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed February 23, 1956

I

Notice is hereby given that Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman, as trustee under a deed of trust dated November 6, 1943, and Edward Gornish, intervening defendants named above, hereby appeal to the Supreme Court of the United States from each and every part of the final judgment and injunction entered in this action on December 23, 1955 which:

[fol. 46] (1) enjoined, set aside, annulled and voided two orders of the Interstate Commerce Commission, respectively dated March 2, 1955 and May 24, 1955 and entered in Finance Docket Nos. 14692 and 18656, to the extent that

said orders (a) continued or asserted the jurisdiction of the Interstate Commerce Commission over Alleghany Corporation, pursuant to Section 5(3) of the Interstate Commerce Act [49 USCA Section 5(3)], and (b) subjected or continued to subject Alleghany Corporation to the provisions of Section 20(1) to (10) and Section 20a(2) to (11) of the Interstate Commerce Act [49 USCA Section 20(1) to (10) and Section 20a(2) to (11)], and (c) retained the jurisdiction of the Interstate Commerce Commission over Alleghany Corporation for the purpose of making further necessary or appropriate orders;

(2) enjoined, set aside, annulled and suspended two orders of the Interstate Commerce Commission, respectively dated May 26, 1955 and June 22, 1955 and entered in Finance Docket No. 18866, which authorized Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of new 6% convertible preferred stock, having a par value of $10 per share, in exchange for its existing cumulative 5½% preferred stock, Series A, having a par value of $100 per share, on the basis of 10 shares of said 6% convertible preferred stock for each share of said cumulative 5½% preferred stock, and (b) not exceeding 14,768,352 shares of common stock, having a par value of $1.00 per share, upon conversion of said 6% convertible preferred stock; and

(3) enjoined Alleghany Corporation, its transfer agents, [fol. 47] officers, directors, servants and employees from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said cumulative 5½% preferred stock, or for any other purpose, or the transfer thereof.

This appeal is taken pursuant to 28 USCA Sections 1253 and 2101 (b).

II

The Clerk is requested to include in the transcript of the record of this cause (in addition to those portions thereof heretofore designated in the Notice of Appeal, dated January 31, 1956, filed herein by the defendant Alleghany Corporation, and those portions thereof heretofore designated in the Cross Designation, dated February 9, 1956, filed

herein by the plaintiffs), for transmission to the Clerk of the Supreme Court of the United States, the following:

1. The order of the United States District Court (per Walsh, J.), dated September 2, 1955 and endorsed on the motion papers designated in Item 67 at page 13 of said Notice of Appeal of the defendant Alleghany Corporation, granting the motion of these defendants for permission to intervene and become parties to this action and to serve the proposed answer included in said motion papers.

* * * * * * *

[fol. 48] III

The following questions are presented by this appeal:

1. Did the District Court err in holding that the orders of the Interstate Commerce Commission (the ICC), mentioned in subparagraphs (1) and (2) of Section I hereof, are reviewable in an action under 28 USCA Sections 1336, 1398, 2284 and 2321-2325 (the Urgent Deficiencies Act).

2. Did the District Court err in holding in substance and effect, in this action under the Urgent Deficiencies Act to review said orders of the ICC:

(a) that the alleged status of the defendant Alleghany Corporation (Alleghany) under the Investment Company Act of 1940, and the alleged conspiracy of Alleghany and others to avoid registration, regulation and liability thereunder, were relevant and material matters;

(b) that the District Court had power to determine Alleghany's status under said Investment Company Act, and the nature and extent of the rights, privileges and benefits thereunder of the plaintiffs, as common stockholders of Alleghany;

(c) that the plaintiffs had standing to sue in respect of said orders of the ICC on the basis of their claimed independent rights under said Investment Company Act;

(d) that the District Court had power to enforce the [fol. 49] claimed independent rights of the plaintiffs under said Investment Company Act by granting the injunctive relief specified in subparagraph (3) of Section I hereof;

(e) that the plaintiffs could not enforce their claimed

independent rights under said Investment Company Act in a plenary action against Alleghany, because such an action would constitute an improper collateral attack upon said orders of the ICC;

(f) that the absence of such a remedy justified such enforcement in this action; and

(g) that, in making the orders mentioned in subparagraph (1) of Section I hereof (the status orders), the ICC granted Alleghany an exemption from the terms of said Investment Company Act.

3. Did the District Court err in holding:

(a) that an order of the ICC dated June 5, 1945, which assumed jurisdiction over Alleghany pursuant to 49 USCA Section 5(3) upon the basis of Alleghany's then control of a carrier parent other than the defendant The New York Central Railroad Company (Central), automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, and that the ICC thus automatically lost jurisdiction over Alleghany on January 19, 1954, although by its terms said order remained in full force and effect unless and until the ICC ordered otherwise, and although the ICC did not order otherwise until it made the status orders;

(b) that an order of the Securities and Exchange Com-[fol. 50] mission (SEC) dated October 4, 1945, which terminated Alleghany's registration under said Investment Company Act and exempted it from regulation thereunder upon the basis of its regulation under the Interstate Commerce Act pursuant to said ICC order dated June 5, 1945, also automatically lost its efficacy when Alleghany divested itself of such control on January 19, 1954, and that Alleghany automatically lost such exemption on January 19, 1954, although said SEC order expressly provided for its revocation, suspension or modification after appropriate notice and opportunity for hearing, and although the SEC had not held any hearing and had not made any order respecting such revocation, suspension or modification;

(c) that Alleghany thus automatically became an unregistered investment company on January 19, 1954, thereafter and still subject to the provisions of said Investment

Company Act relating to an unregistered investment company; and

(d) that the issuance of said 6% convertible preferred stock would violate those provisions.

4. Did the District Court err in refusing to hold:

(a) that Alleghany's registration automatically revived and Alleghany automatically reverted on January 19, 1954 to its former status as a registered closed-end, non-diversified, management investment company; and

[fol. 51] (b) that, as such a registered investment company, it was lawful for Alleghany to issue said 6% convertible preferred stock in exchange for said cumulative 5½% preferred stock without prior SEC approval; or

(c) that the SEC has primary jurisdiction to determine whether Alleghany became a registered or an unregistered investment company on January 19, 1954, and whether it is lawful for Alleghany to issue said 6% convertible preferred stock in exchange for said cumulative 5½% preferred stock without prior SEC approval.

5. Did the District Court err in holding:

(a) that the status orders are wholly null and void; and also

(b) that the portions thereof which terminated said ICC order dated June 5, 1945 are effective.

6. Did the District Court err in holding:

(a) that, if Alleghany controls Central, a carrier parent which controls numerous carrier subsidiaries, its acquisition of such control constituted a non-carrier acquisition of control of two or more carriers, subject to authorization and approval by the ICC under 49 USCA Section 5(2);

(b) that, if Alleghany controls Central, the transaction authorized and approved by the status orders under said Section 5(2), which involved a merger of the properties of one Central subsidiary into another and a lease by the latter to Central of the properties so merged, did not constitute a non-carrier acquisition of control by Alleghany [fol. 52] of the properties so merged and leased, within the meaning of said Section 5(2) and subject to ICC authorization and approval thereunder;

(c) that the ICC's determination, that said transaction constituted such a non-carrier acquisition of control by Alleghany and that Alleghany was a necessary party to the application for authorization and approval thereof under said Section 5(2), was irrational;

(d) that the ICC has been inconsistent in its determinations respecting such merger or lease transactions, as acquisitions of control within the meaning of said Section 5(2) and subject to ICC authorization and approval thereunder; and

(e) that such inconsistency deprived its determination in this case of substantial weight before the District Court.

7. Did the District Court err in refusing to hold:

(a) that, if Alleghany controls Central and if its acquisition of such control was subject to ICC authorization and approval under said Section 5(2), such acquisition constituted a violation of 49 USCA Section 5(4);

(b) that Alleghany is subject to regulation by the ICC in respect of such violation under 49 USCA Sections 5(7), 5(8) and 5(9), regardless of the validity of the status [fols. 53-55] orders; and

(c) that, if Alleghany controls Central, it is subject to regulation by the ICC under 49 USCA Section 12(1), whether or not its acquisition of such control was lawful, and regardless of the validity of the status orders.

8. Did the District Court err in holding that the plaintiffs were entitled to an evidentiary hearing on the issue of Alleghany's actual control of Central, although they failed to deny Alleghany's allegations respecting its ownership of shares of Central's stock and its right to vote additional shares of Central's stock, and although such allegations showed that Alleghany had acquired the power to exercise control over Central.

9. Did the District Court err in dismissing the defenses alleged in the answers of these defendants.

10. Did the District Court err in enjoining, setting aside, annulling and voiding the status orders in so far as they related to Alleghany.

11. Did the District Court err in enjoining, setting aside, annulling and suspending the preferred stock orders.

Dated: February 23, 1956.

Edward M. Garlock, 521 Fifth Avenue, New York 17, N. Y., Attorney for the defendants Baker, Weeks & Co., Oscar Gruss & Son, Irving Neuman as Trustee under a Deed of Trust dated November 6, 1943, and Edward Gornish.

[fols. 56-59] AFFIDAVIT OF SERVICE (omitted in printing)

[fol. 60] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL BY ADELAIDE NEUWIRTH TO THE SUPREME COURT OF THE UNITED STATES—Filed February 3, 1956

I. Notice is hereby given that Adelaide Neuwirth on behalf of herself and all other common stockholders similarly situated, an intervening defendant above named, hereby appeals to the Supreme Court of the United States from each and every part of the final judgment and injunction entered in this action on December 23, 1955, which enjoined Alleghany Corporation, its transfer agents, officers, directors, servants and employees, from taking any steps in connection with or in furtherance of issuance of 6% convertible preferred stock in exchange for 5½% preferred stock, or for any other purpose, or the transfer thereof.

This appeal is taken pursuant to 26 U. S. C., Sections 1253 and 2101(b).

[fols. 61-64] II. The Clerk is not requested to prepare any transcript of the record in this cause other than that already requested by the defendant Alleghany Corporation.

III. The following questions are presented by this appeal:

1. Whether, assuming plaintiffs' right to challenge the orders of the I. C. C., the District Court erred in enjoining said preferred stock orders, thus causing irreparable damage to Alleghany's innocent preferred and common stockholders.

2. Whether the District Court committed an abuse of discretion in granting a preliminary injunction and a permanent injunction restraining the completion of Alleghany's offer to exchange new preferred stock for its old preferred stock.

Dated: February 2, 1956.

Alexander Kahan & Arthur W. Lichtenstein, Esqs.,
By Alexander Kahan, Attorneys for intervening Defendant Adelaide Neuwirth, etc., 60 Broad Street, New York 4, New York.

[fols. 65-66] AFFIDAVIT OF SERVICE

(omitted in printing)

[fols. 67-69] NOTICE OF APPEAL

(omitted, printed side page 60 ante)

[fol. 70] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1956

EXCERPT FROM STIPULATION AS TO PRINTING RECORD—

Filed September 20, 1956

* * * * * * * *

"And it is further stipulated and agreed that the parties may refer in briefs or on oral argument to the original

transcript of record filed with the Supreme Court, including parts not printed".

• • • • • • •

[fol. 71] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation, Plaintiffs,

against

UNITED STATES OF AMERICA AND THE

INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed June 6, 1955

Plaintiff Breswick & Co. by Rosston, Hort & Brussel, its attorneys, and Randolph Phillips, pro se, for their complaint, respectfully allege, upon information and belief, except as to the allegations of paragraphs 1, 2 and 3, which are alleged upon knowledge:

1. Jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C. A. Sections 1336, 1398 and 2321 through 2325, inclusive.

2. Plaintiffs reside and have their respective offices within the Southern District of New York. Plaintiff Breswick & Co. is a partnership composed of Carl S. Bresnick and Pauline S. Bresnick.

3. Plaintiffs are the beneficial owners of 700 shares of common stock of Alleghany Corporation (hereinafter "Alleghany"). Plaintiff Phillips is the Chairman of The Protective Committee for Common Stockholders of the Alleghany Corporation of which he, one Myron J. Neisloss and one Edward C. Sterling are members, the Committee being, collectively, the beneficial owners of 1700 shares of the common stock and the holder of proxies from other owners of the common stock of Alleghany. The interest

[fol. 72] of the Committee in the matters herein complained of is set forth in Exhibit A hereto annexed.

4. Alleghany is a corporation organized and existing under the laws of the state of Maryland maintaining its principal office within the Southern District of New York.

5. On or about September 17, 1954, Alleghany filed with the Interstate Commerce Commission (hereinafter "I. C. C.") an application under Section 5(2) of the Interstate Commerce Act, in Finance Dockets Nos. 14692 and 18656. By said application Alleghany sought approval of certain transactions relating to the New York Central Railroad Co., the Cleveland, Cincinnati, Chicago & St. Louis Railroad (hereinafter "Big Four"), and the Louisville & Jeffersonville Bridge & Railroad Co.

6. The ostensible purpose of said application was to obtain the I. C. C.'s approval and authorization of a proposed merger of the properties and franchises of Louisville and Jeffersonville Bridge & Railroad Co., into the Big Four for purposes of ownership, management and operation and "continued control" of said properties by the New York Central Railroad Co. and Alleghany; and to obtain for Alleghany a finding, report, and order by the I. C. C. to the effect that Alleghany was subject to its jurisdiction pursuant to Section 5(3) of the Interstate Commerce Act.

7. It was the intention and purpose of Alleghany and the persons controlling it, by means of such application, [fol. 73] finding, report and order, to avoid registration with the Securities and Exchange Commission (hereinafter "S. E. C.") under the Investment Company Act of 1940 (Title 15, U. S. C. A. Sec. 80a-1, et seq.)

8. Alleghany is controlled by Robert R. Young, its Chairman, and Allan P. Kirby, its President, and both were and are directors of Alleghany and members of its Executive Committee, and continue to act in said capacities, and by reason of these positions, their ownership of voting stock of Alleghany and their nomination, sponsorship and business relations with the other members of Alleghany's Board of Directors, dominated its Board and Executive Committee and controlled Alleghany, and continue so to do.

9. Neither Young nor Kirby nor any other member of Alleghany's Executive Committee or Board of Directors were parties to said application.

10. By report and order dated May 24, 1955, of which copies are annexed hereto as Exhibit B-1 and B-2, respectively, the I. C. C. permitted plaintiffs to intervene in the proceedings on said application and to be treated as parties hereto, and, in so doing, reversed prior orders of its Division 4, dated February 9, 1955, February 15, 1955 and March 2, 1955, denying previous applications by plaintiffs for such intervention.

11. By report and order dated March 2, 1955, Division 4 approved the application of Alleghany, overruled the objections of plaintiffs thereto, and denied plaintiffs an evidentiary hearing upon the merits thereof. Copies of said report and order are annexed hereto as Exhibits B-3 and B-4, respectively.

[fol. 74] 12. On March 28, 1955 plaintiffs filed a petition and on April 11, 1955, an amended petition for reconsideration by the full Commission of said March 2nd report and order of Division 4.

13. By report and order dated May 24, 1955, the I. C. C. overruled all of plaintiffs' objections to said application, denied plaintiffs an evidentiary hearing upon its merits, and affirmed the March 2nd order of Division 4 approving and authorizing said application.

14. Upon petition and supplemental petition of the S. E. C., the I. C. C. permitted the S. E. C. to intervene in this proceeding for the limited purpose of filing a memorandum dated September 14, 1954, and a supplement thereto in opposition to continuation by the I. C. C. of Alleghany's status as a carrier under the Interstate Commerce Act.

15. The S. E. C. and plaintiffs both contended unsuccessfully before the I. C. C. in said proceeding that it was the latter's duty and obligation under the Interstate Commerce Act to dismiss or deny the application of Alleghany; and plaintiffs further unsuccessfully contended that Alleghany's application was not lawfully or properly made under Sections 5(2) and 5(3) of the Act; that the I. C. C. was without authority in law or in fact to approve said

application; and that said application was merely a device to deprive the stockholders of Alleghany of their rights and protection under the Investment Company Act.

16. From at least January 19, 1954 to May 31, 1955, [fol. 75] Alleghany had outstanding the following capital securities of which it is the issuer: $15,200,000 Bank Notes due 1955-1956; $7,496,000 5% Debentures due November 1, 1962; 25,845 Shares of $4 Prior Preferred Convertible Stock; 136,744 Shares of 5½% Series A, Preferred Stock; 4,637,797 Shares of $1 Par Value Common Stock; and 2,000,000 Perpetual Warrants to purchase common stock at $3.75 per share.

17. Alleghany is engaged, and from January 19, 1954 to date held and now holds itself out as being engaged primarily, and proposed during said time and now proposes to engage primarily, in the business of investing, re-investing and trading in securities.

18. From January 19, 1954, Alleghany was engaged and proposed to engage, and is engaged and proposes to engage, in the business of investing, re-investing, owning, holding and trading in securities, and owns and proposes to acquire investment securities having a value exceeding forty (40%) per centum of the value of such issuer's total assets (exclusive of Government securities and cash items) on an unconsolidated basis.

19. From January 19, 1954, to date, by reason of the above facts, Alleghany was and is an "investment company" as that term is defined in and by Section 3(a) of the Investment Company Act of 1940, 15 U. S. C. A. Sec. 80a-3(a).

20. From November 1, 1940, to October 4, 1945, Alleghany was an investment company registered with the S. E. C. under said Investment Company Act.

[fol. 76] 21. By order entered on June 5, 1945, in Finance Docket Number 14692, the I. C. C. approved and authorized the acquisition by Alleghany of control of the Chesapeake & Ohio Ry. Co. (hereinafter "C & O"), the Big Four, and the Pere Marquette Ry. Co., and their subsidiaries and affiliates, and directed that "unless and until otherwise ordered Alleghany shall be considered as a carrier subject to the provisions of Section 20(1) to (10), in-

clusive and Section 20(a)(2) to (11), inclusive, of the Interstate Commerce Act, to the same extent that those provisions are applicable to the Chesapeake & Ohio Railway Co. and its carrier subsidiaries and affiliates". During the year 1947 Alleghany and C & O divested themselves of control of the Big Four and its subsidiaries and affiliates, and the Pere Marquette Railway Co. was me-ged into the C & O.

22. Section 3(c)(9) of the Investment Company Act, 15 U. S. C. A. Sec. 80a-3(c)(9), excepts from the definition of an investment company "any company subject to regulation under the Interstate Commerce Act."

23. On October 4, 1945, the S. E. C., on the basis of the facts set forth in Paragraphs Nos. 21 and 22 above, declared in its Findings, Opinion and Order (20 S. E. C. 731) that Alleghany "has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940" and ordered the termination of Alleghany's registration under said Act.

[fol. 77] 24. By petition to intervene of plaintiff Breswick & Co. in said proceeding dated February 4, 1955, (Exhibit C-1 annexed) and its accompanying motion to deny said application (Exhibit C-2 annexed); and by amended petition to intervene of plaintiff Breswick & Co. dated February 18, 1955, (Exhibit D-1 annexed) and its accompanying motion to dismiss said application (Exhibit D-2 annexed); and by petition of plaintiff Phillips for rehearing and reconsideration dated March 23, 1955, (Exhibit E annexed; and by amended petition of plaintiffs for leave to intervene herein and for reconsideration dated April 8, 1955, (Exhibit F annexed) plaintiffs duly demanded an evidentiary hearing with respect to the matters and things therein and in said application of Alleghany contained, and duly offered to present upon such hearing material and relevant testimony in respect thereof, and duly requested an opportunity to examine and cross-examine Alleghany's officers, directors and other witnesses, with respect to the issues raised by the pleadings, and duly advised the I. C. C. of the pendency in the United States District Court for the Southern District of New York of Civil Action No. 98-371 in which plaintiff Breswick & Co. and said Neisloss were

plaintiffs, and in which Alleghany, its directors, and Clint W. Murchison, Clint W. Murchison, Jr., John D. Murchison, Murchison Brothers, and Sidney W. Richardson were defendants, and duly presented to the I. C. C. a copy of the original complaint in said action of which a copy is annexed hereto as part of Exhibit D-2, and from which it appears that plaintiffs in said action alleged that the failure of Alleghany to re-register with the S. E. C. upon its [fol. 78] divestiture of C & O, and the filing of said application to be declared a carrier under Section 5(3) of the Interstate Commerce Act were part of and overt acts in a conspiracy between and among all of the defendants in said action to avoid the regulatory procedures and penalties of the Investment Company Act governing divers transactions of the individual defendants in said action with Alleghany, all as more particularly set forth in the first count of said complaint, and from which it further appears that the granting of said application of Alleghany without a plenary, evidentiary hearing upon the merits would not be in the public interest.

25. Notwithstanding the materiality and relevance of the allegations contained in said pleadings and the first count of said complaint, the I. C. C. conducted no inquiry with respect thereto and failed and refused to order a hearing thereon as requested in said proceeding by the plaintiffs in this action. By the failure of the Commission to order an evidentiary hearing with respect to said allegations, plaintiffs were deprived of an opportunity to adduce proof in respect of said allegations, and to examine and cross examine the officers and directors of Alleghany and other witnesses with respect thereto. Without conducting such a hearing the I. C. C., by its order of May 24, 1955, approved said application of September 17, 1954 which was verified under oath only by one Deegan, Vice-President in charge of Public Relations of Alleghany.

26. The acts of the I. C. C. herein complained of, and its reports and orders of March 2, 1955 and May 24, 1955 in [fol. 79] Finance Dockets Nos. 14692 and 18656, approving said application, were arbitrary and capricious, not in accordance with legal standards, unsupported by substantial evidence and in violation of the Interstate Commerce Act and the Administrative Procedure Act, and denied to plain-

tiffs due process of law and a fair and impartial hearing upon the merits of said application.

27. The defendant I. C. C. has illegally and unlawfully arrogated to itself the power to regulate Alleghany under the Interstate Commerce Act, and has illegally and unlawfully deprived plaintiffs and all other common stockholders of Alleghany of the rights and protections accorded to them under the Investment Company Act, and continues so to do, to their irreparable prejudice and damage.

28. The loss of these rights and protections can in large part never be recovered, and certain of them are not compensable in damages.

29. Plaintiffs have no adequate remedy at law.

30. Unless this Court issues an interlocutory and permanent injunction restraining the defendant I. C. C. from further authorizing Alleghany to continue under its regulation, plaintiffs and all other common stockholders of Alleghany will continue to suffer further irreparable damage, non-compensable at law.

Wherefore, plaintiffs pray:

(A) That a Court constituted as required by Title 28, [fol. 80] U. S. C. 2284, be convened and that process issue against defendants as provided by law.

(B) That a temporary or interlocutory injunction be entered herein vacating the orders of the Commission dated March 2, 1955, and May 24, 1955, in Finance Dockets Nos. 14692 and 18656, insofar as said orders approve and authorize the application of Alleghany Corporation therein dated September 17, 1954.

(C) That a permanent injunction be entered herein requiring the defendant Commission to set aside, nullify and void in its entirety its orders of March 2, 1955, and May 24, 1955, in Finance Dockets Nos. 14692 and 18656, insofar as said orders approve and authorize the application of Alleghany Corporation therein dated September 17, 1954.

(D) That said Court grant to plaintiffs such other and further relief as may be just and equitable.

Rosston, Hort, & Brussel, By George Brussel, Jr., a partner, Attorneys for plaintiff Breswick & Co., Office and Post Office Address, 141 Broadway, New

York 6, New York, Randolph Phillips, Pro Se, Office and Post Office Address, 53 East 74th Street, New York 21, New York.

[fol. 81] *Duly affirmed by Randolph Phillips. Jurat omitted in printing.*

[fol. 82] EXHIBIT "A" TO COMPLAINT

Have the Insiders Taken Advantage of Alleghany's Stockholders?

Without putting up a penny in cash Murchison's two sons have made 7½ million dollars on I. D. S. stock bought from our Corporation. Another 11½ million has been made on New York Central stock by Young, Kirby, Murchison and Richardson. This unrealized but presently available profit was made possible by our Corporation lending 14 million dollars to these 6 men.

In December, 1954 the S. E. C. stated its belief "that Alleghany is now preponderantly engaged in the business of an investment company, and that therefore its public investors should be afforded the protections of the Investment Company Act." We agree. We also believe the above profits, totaling 19 million dollars, belong to the Alleghany stockholders.

We have formed a Stockholders "Watchdog" Committee to obtain these protections and profits. If you approve our program, we ask you to sign the enclosed blue proxy. Please mail it promptly in the stamped return envelope.

[fol. 83] To the Holders of the Common Stock of Alleghany Corporation

The following facts indicate, in our opinion, that Robert R. Young, as Chairman, and Allan P. Kirby, as President, have been conducting the Corporation's affairs primarily in the interest of themselves and a small group of insiders and secondarily in the interest of the other 14,500 common stockholders.

A 7 Million Dollar Profit for Murchison's Two Sons

In December, 1953, Young and Kirby each bought 100,000 shares of the capital stock of the New York Central Railroad at about $18 per share. This was the first step in their campaign to obtain for themselves positions as Chairman and directors of the railroad. The same month Alleghany sold 5,650 shares of the Class A Common and 27,500 shares of the Voting Common Stock of the Investors Diversified Services, Inc. These shares, representing 24½% of the voting control of IDS, were sold to two sons of Clint W. Murchison for $4,143,750. Shortly thereafter the stock was split 5 for 1, and closed 1954 at a market price of more than $11,900,000.

In Alleghany's 1954 annual report Young claims the sale price was "substantially above the then market price." But he omits stating whether the Murchisons could have bought such a 24½% block without raising the market price even higher.

Alleghany lent the entire purchase price for the IDS shares to the Murchisons, received no cash for the sale, and instead is to be paid back in the form of 4% notes, payable in 5 years, plus 50% of the profit, if any, on shares of the Canadian and American Delhi Oil Companies deposited as collateral for the notes. Since their pledge as collateral, these oil stocks have declined more than 25% in market value. If there is no profit on these stocks, Alleghany will have lost more than 7 million dollars which it could have made had it retained these IDS shares and sold them today for cash.

Why were Murchison's sons given the opportunity to buy the IDS stock on such easy terms? Why were not the IDS shares, instead of the oil shares, deposited as collateral under the profit sharing arrangement? When did IDS first consider splitting the stock? Mr. Young's reports are silent on these aspects.

[fol. 84] Judged by the comparable market performances during the last year it would seem that the Murchisons were given a chance to exchange 50% of their profit in inferior securities, over a 5-year period, in return for 100% of the subsequent rise in one of Alleghany's best assets.

The Law Suit in Your Behalf to Recover the IDS Profits

On February 14, 1955 Breswick & Company and Myron Neisloss, as stockholders of Alleghany, brought suit in your behalf against Young, Kirby and Murchison in the United States District Court of New York (Civil Action No. 98-371), alleging that these profits are payable to your corporation. The complaint alleges that the IDS sale was made "with the intent to induce the Murchison Group to permit themselves to be used as a vehicle to aid defendants Young and Kirby to obtain control of Central with the use of the resources, credit, personnel and facilities" of Alleghany.

In their letter to you dated April 19, 1955 transmitting the 1954 annual report Young and Kirby failed to reveal to you the existence of this litigation.

Was Control of C&O Sold to Cyrus S. Eaton For Less Than Its Fair Value?

Under the law Young and Kirby could not be Chairman and directors of both the New York Central and The Chesapeake & Ohio Railroads. Therefore they resigned from the C&O on January 19, 1954 and caused Alleghany to sell to Eaton 104,854 shares of that road's Common Stock. The price was $3,595,118 or $34.29 per share, the closing market price for that day. But, in addition to selling these shares, Young and Kirby divested Alleghany of the legal right to control the C&O. This had been obtained under an I. C. C. order dated June 5, 1945. In addition they caused 5 other Alleghany representatives out of 13 members of the C&O Board to resign, thereby making it possible for Director Eaton to elect a new majority and obtain control.

Prior to this time Young and Eaton were the two leading advocates in the country of competitive bidding for railroad securities. Yet when it came to serving their personal purposes, they threw overboard this principle and engaged in a secretly negotiated, non-competitive sale.

Why were these shares not offered publicly on the same terms at competitive bidding? Young's reports are silent on this question.

Today the C&O stock is worth $1,600,000 more in the

market than Eaton paid Alleghany. In addition $300,000 of dividends have been paid Eaton.

[fol. 85] How the Insiders Have Made 11½ Million Dollars in Personal Profits on New York Central Stock

As subsequent steps in their campaign Young and Kirby arranged for Clint W. Murchison and Sid W. Richardson to buy 800,000 shares of the capital stock of the New York Central from the C&O on February 24, 1954 at $25 per share. Young withheld disclosing until 6 weeks later that Alleghany had lent Murchison and Richardson 7½ Million Dollars, or 37½% of the 20 Million Dollar purchase price. Two days later, on April 8, 1954, it was disclosed that Alleghany, under Young and Kirby's control, would lend Young, Kirby, Murchison and Richardson the money needed to finance their personal proxy contest to obtain positions for themselves and associates on Central's Board of Directors. A total of $1,300,000 was lent by Alleghany for this purpose.

The proxy contest was concluded successfully on June 14, 1954 with the election of the Young-selected Board of Directors. By that date the total purchases of New York Central stock for the account of Alleghany amounted to 11,400 shares, representing a total investment of no more than $300,000. But Young, Kirby, Murchison and Richardson had purchased for their personal account no less than 1,000,000 shares of Central at prices ranging from $18 to $25 per share.

Thus, if the market went up beyond $25 per share in the months immediately following as a consequence of the victory, Alleghany had no means of obtaining any stock at this or a lower price, even though by lending $8,800,000 of its funds it had made it possible for the insiders to capitalize on their personal position in the stock and win election to the Board of Central.

On the other hand, if the stock went down, at least $7,500,000 of Murchison and Richardson's investment, under an arrangement set forth hereafter, would be carried by Alleghany loans.

In the 1954 Annual Report Young states that until control of Central "was an accomplished fact your Company

put virtually nothing at risk". If a policy of minimum risk to Alleghany was their governing motive, why didn't Alleghany's directors insist that Young and Kirby gave Alleghany a *bona fide* option to buy their 200,000 shares of Central stock at their ground-floor cost price of only $18 per share? Instead, they first bought such a block for your Corporation's account months later at $25 per share, a difference of $1,400,000.

To date Messrs. Young, Kirby, Murchison and Richardson personally have an unrealized but total possible profit available to themselves, at current market prices, of more than $11,600,000.

[fol. 86] Alleghany Gives Up 18 to 24 Million Dollars Possible Profits To Make 14 Million Dollars on New York Central

Following the proxy election the price of Central stock went down in the market until on July 15, 1954 it was $22 per share. Thereupon the Murchisons and Richardson each sold Alleghany 150,000 shares or a total of 300,000 shares of Central stock at $25 per share. Alleghany placed these shares in a joint venture with the Murchisons and Richardson, to which the latter contributed an equal number of Central shares, making a total of 600,000 shares so held, on which Alleghany is to receive 50% of all the income and profits. The Murchisons and Richardson, pursuant to the purchase and loan agreement made earlier have guaranteed Alleghany against loss on its 300,000 shares. There has been no disclosure as to how long this guarantee will be in effect. The Murchisons and Richardson are to get 50% of the profits. But, in order to finance their carrying their share of the venture, Alleghany has lent them $3,250,000 each at 4½% annually.

An additional 200,000 shares were sold by Richardson to Kirby in the summer of 1954, also at $25 per share, after Kirby had lent Richardson $5,000,000 in March, 1954 to buy the shares.

From July to November, 1954, Alleghany bought another 265,600 shares of Central, which with the 11,400 shares previously bought, cost $6,625,000. Thereafter another 110,000 shares was bought prior to March, 1955, for an as yet un-

disclosed price which we estimate at roughly $3,000,000. Thus, from January 19, 1954 to March 1, 1955, Alleghany acquired 387,000 shares, plus a 50% interest in 600,000 shares, at an average cost of $25 per share. On April 19, 1955, Central closed at $43⅛ per share. This indicates the corporation had available to it a gross unrealized profit of some $12,442,000 on an original investment costing roundly $17,075,000. In addition it holds options to purchase 135,000 shares which, if sold or exercised, will increase its available profits, based on present prices, by $1,755,000 and, if exercised, its capital investment by $4,050,000.

From December 1, 1953, the start of Young's campaign, to date, it is now obvious that there were innumerable opportunities for Alleghany to invest in the rail market, and to participate in the climb of the Dow-Jones Rail Stock Index from $99 to its recent level of $161, an increase of 66⅔%. Thus, simply by investing the same sums in the general rail market, as represented by the Dow-Jones average, that have been invested in Central, namely 17 Million Dollars, Alleghany today could have total unrealized profits of up to $11,320,000. Had it participated in only 50% of that 17-months rise, these profits would be at least $5,660,000.

[fol. 87] But, in addition to these profits Alleghany would have available, had it not engaged in the above transactions with the insiders, the $7,400,000 subsequent increase in market value of the IDS securities. It could also have placed on March 15, 1954 the $7,500,000 loaned to Murchison and Richardson (and which is still on loan to them) in the rail market then represented by the Dow-Jones average of $101. To date such investment would show a profit of 60% or $4,500,000. The $1,300,000 proxy fund borrowed by the insiders would show, on a similar basis, a profit of $780,000.

The total of these items is $18,340,000, assuming only a 50% participation in the 17-months rise as above mentioned, or 24 Million Dollars assuming a 100%.

Thus Young and Kirby caused Alleghany to surrender or not take investment opportunities that would have made available to your corporation some 4 to 10 Million Dollars more market profits to date. In doing so, they satisfied,

to the fanfare of national publicity, Young's personal ambition. They also made available to themselves and Messrs. Murchison and Richardson a total of 18½ Million Dollars in insiders' profits.

Three Transactions in which Young and Kirby Favored Themselves as Preferred Stockholders

1. Alleghany is Deprived of 15½ Million Dollars of Possible Profits in IDS Stock

Early in 1949 Robert W. Purcell, then Vice President of Alleghany, recommended that it buy 48,225 shares of Class A Common Stock of IDS at an average cost of $8.15 and 90% of the controlling voting common stock, then 104,405½ shares, at $18.25 per share. This proved to be one of Alleghany's most successful purchases, and it has a total realized and unrealized profit in IDS stock of more than $28,000,000. But this profit would today be at least $15,000,000 higher had not 48,125 of the Class A shares been taken by Young and Kirby in 1950 in exchange for 4,840 shares of Alleghany Series A 5½ Preferred Stock.

The exchange was approved by a vote of Alleghany's stockholders at the annual meeting on May 3, 1950, pursuant to proxy statements sent out by Young and Kirby dated April 6 and 26, 1950. On May 25, 1954, however, a complaint was filed by a group of Alleghany stockholders in the United States District Court for the Southern District of New York, Civil Action No. 92-205, against Young and Kirby, charging them with procuring the favorable vote by means of statements which by reason of omission of material facts were false and misleading. Alleghany's 1949 Annual Report revealed a net loss of $1.32 per IDS share in 1948 and a net profit of $1.92 per share in 1949, adding that "The outlook for eventual profits is considered to be unusually promising." How "promising" was not disclosed, since the April, 1950 proxy statements omitted to state that the net profits for the first 3 months of 1950 [fol. 88] had already reached $2.17 per share or according to the complaint "on an annual basis, $8.68 per share, that is, more than the entire price paid by defendant Young and Kirby".

Today the Alleghany preferred stock transferred back to the Corporation by Young and Kirby, pursuant to the exchange offer, is worth roundly $1,152,000 at current market prices. The 48,125 shares of IDS stock are worth, at market, roundly $16,600,000.

2. Another $800,000 Possible Profit for Mr. and Mrs. Robert R. Young

In May, 1953, Young and Kirby obtained the stockholders and the I. C. C.'s approval to a plan under which the holders of the outstanding $2.50 Prior Preferred Stock were given an opportunity to exchange their shares for a new $4 Prior Preferred. The old stock then had a maximum legal claim on the assets of the Corporation of $50 per share, plus unpaid and accrued dividends of roughly $30, or a total of $80. Each share was also convertible at any time into 10 shares of Alleghany common whose 1953 low was $3 and high $5.37½ per share. Based on the price of the common stock prevailing at the time of the exchange offer the conversion privilege for the new stock reflected its liquidating claim in terms of common stock. But in addition the Prior Preferred stockholders received a 60% increase in their dividend rate.

Mr. and Mrs. Young then owned 12,650 shares and now own 15,150 shares, or 44.5% and 58.6% of the outstanding issue. Each share of the new stock is convertible into 16 shares of common stock, recently worth $144 as a result of the common's subsequent rise. Thus Young in 1953 caused the Corporation to make a deal which, as of recent prices, gives him the opportunity to make a profit of $64 per share above the 1953 maximum lawful claim of the stock, an increase of 80%, or $809,600 on his and Mrs. Young's holding.

3. Attempting to Give the Series A Preferred Stockholders a 2 to 6 Million Dollar Premium

Under date of January 14, 1955 the Young-Kirby management circulated to you the details of a plan for issuance of a new 6% Preferred Stock to be convertible into up to 10,000,000 shares of new common stock, which new stock will be exchanged for the presently outstanding Series A

5½% Preferred Stock. This plan was approved by vote of the stockholders at a special meeting held on February 8, 1955. The plan is now pending before the I. C. C. for approval.

The redemption price of the Series A Preferred Stock is $105 per share, plus the amount of all dividends accumulated and unpaid thereon whether or not earned or declared. Since dividend arrearages, as of May 1, 1955, were $132 per share, the maximum claim of the holders of this stock is now $237 per share.

[fol. 89] On March 25, 1955—less than 2 months after approval of the plan—the stock was quoted at a new all-time high of $273 per share. This represented $36 per share higher, or $5,922,784 for all 136,744 shares now outstanding, than its maximum lawful claim upon the assets of the Corporation. Since then the premium has fallen to $14¾ per share higher, or $2,016,974 for the issue. We see no reason why any premium of 2 to 6 million dollars should be given the preferred stockholders. In our opinion any value over the maximum lawful claim of the preferred belongs to the common stockholders, and we shall strive to obtain it.

Young, prior to the publication of this plan, increased his personal holdings of the Series A stock from 5,179 shares, as of April, 1954, to 11,087 shares, as of December 1, 1954. Mrs. Young's holdings were increased by 600 shares to 3,738. The Youngs own 10.8% of the total Series A preferred, and thus have available to themselves from $217,832 to $639,654 of the above premium.

On April 6, 1955 in an action instituted in the United States District Court by members of your Committee to stop the plan, Judge Lawrence E. Walsh ruled that a motion for a preliminary injunction was "premature" but that the common stockholders had "a right to challenge the jurisdiction of the I. C. C." to approve the plan. "They cannot," he said, "be estopped by management's acquiescence to unauthorized regulation".

What Is Best For Alleghany's Stockholders: Regulation by the S. E. C. or the I. C. C.?

The Investment Company Act prohibits transactions such as the loans to directors, officers and affiliated persons of the $1,308,733 for proxy expenses and of $7,500,000 for personal stock purchases that occurred during the New York Central contest. It also prohibits such transactions as the 1950 deal in the IDS stock by Young and Kirby which deprived Alleghany's stockholders of 15½ million dollars in possible profits. Such transactions can only take place, if at all, under that Act after impartial scrutiny by the S. E. C. as to their legal propriety and fairness to all stockholders. If they meet these tests, and only then, can the S. E. C. issue an order exempting them from the prohibitions of the Act. No such prohibitions or conditional exemptions are set forth in the Interstate Commerce Act.

Young and Kirby allege that the I. C. C. should regulate Alleghany under the Interstate Commerce Act because the Corporation controls the New York Central. We deny this. We think it is plain that Young, Kirby, Murchison, Richardson and their nominees personally control the Central. Alleghany's portfolio, as of November 30, 1954, totaled $79,527,000 at market, of which only $14,646,000 or 18.4% was invested in Central stock, and $64,881,000 or 81.6% in miscellaneous investments.

[fol. 90] We have taken the position, along with the S. E. C., that Alleghany should be registered with it under the Investment Company Act. By preliminary order dated March 2, 1955, the I. C.C. denied this contention. This ruling has not yet become final and is appealable in the courts. We will appeal, if necessary, because we believe in the words of the S. E. C. that "Alleghany is now preponderantly engaged in the business of an investment company, and that therefore its public investors should be afforded the protections of the Investment Company Act".

Why Has the 1955 Annual Meeting Been Postponed?

This meeting originally scheduled for May 4, 1955 was postponed for an undisclosed period of time, according to

an unprecedented Alleghany announcement dated April 22, 1955. The alleged reason was that the I. C. C. had not yet acted on the preferred stock plan. But the announcement came only after your committee had served notice of its intention to solicit proxies. When the meeting is finally held we intend to vote for the election of the following "watchdog" directors:

Nominee	Principal Occupation—1950-1955	Shares of Alleghany Common Beneficially Owned
George Brussel, Jr.	Attorney-at-law; Member, Rosston, Hort & Brussel; Vice President, Director & General Counsel, 80 Broad Street, Inc., and other corporations; Counsel to the Committee and to Breswick & Co. and Myron Neisloss	400
Edward C. Sterling	Research Chemist; investor in and former Director, U. S. Finishing Company; Director, Detroit Harbor Terminal Corp., and various hotels and office buildings	100
Myron Neisloss	Associate, Neisloss Brothers Realty Investment & Construction Co.	1,009
Randolph Phillips	Financial Consultant.	600

We know of no business to be presented for consideration at the meeting other than the election of directors, and adoption of a resoluton proposed by Lewis D. and John J. Gilbert for cumulative voting. We propose to vote for this resolution. If any other business properly comes before the meeting, the enclosed proxy will be voted according to the discretion of the proxies named therein.

[fol. 91] The Committee's Program

1. To seek leave to intervene in, and aid in bringing to a successful conclusion the pending lawsuits against Young, Kirby, Murchison, his sons, and Richardson, which ask the Court to make them account for and pay over to Alleghany the profits available to them on the transactions set forth in this letter.

2. To take before the I. C. C., the S. E. C. and the Courts all steps necessary to obtain for the stockholders the rights and protection of the Investment Company Act.

3. To defeat the pending Series A Preferred Stock plan. Any plan that gives the holders of this stock 100% of their maximum lawful claim and no more, and is otherwise fair and equitable, will be approved by us.

4. To obtain appointment of a full-time President and Vice-President and otherwise to reorganize the management and its practices so as to put an end to the exploitation, which we believe has been amply demonstrated, of the Corporation's resources for the personal benefit of Young and Kirby. President Kirby spends at least half the year on vacation and does not even have an office at Alleghany Corporation. Vice-President Deegan is a full time officer of New York Central. Such absentee managers, in our opinion, are incapable of performing the full-time supervisory duties required of chief executive officers.

5. To elect up to 4 directors to the Board out of a present total of 8 (or of 10 if the Series A Preferred Stock plan is consummated) who will act as "watchdogs" and represent with undivided loyalty the 14,954 holders of the publicly owned Common Stock, and who will be free of all conflicting and ownership interests in other classes of stock.

6. To represent the non-management common stockholders at the 1955 annual meeting originally scheduled for May 4, but which is to be postponed for an undisclosed period of time, according to an unprecedented Alleghany announcement dated April 22, 1955; and to vote at said meeting for the election of the directors listed on page 8 for a term of one year and until their respective successors are elected and qualify.

No compromise or settlement will be made of any Court action except upon notice to you. If a proxy in the accompanying form is duly excuted and returned, the shares will be voted in accordance with such specification. The authorization to act on your behalf before the Courts will be used only until the final determination of the issues or until transfer or sale of your stock.

[fol. 92] Proxy for Protective Committee for Common Stockholders of Alleghany Corporation

The undersigned hereby constitutes and appoints Randolph Phillips and Rudolph Willheim, or either of them, with full power of substitution, attorneys-in-fact and proxies to appear and vote all the shares of stock of Alleghany Corporation standing in the name of the undersigned at the 1955 Annual Meeting of the stockholders of Alleghany Corporation, and at any and all adjournments

thereof, for the electio nof Directors and upon such other business as may properly come before said meeting, and for ( ) or against ( ) the resolution proposing adoption of cumulative voting.

This proxy will be voted for said resolution and the following authorization unless marked by you to the contrary.

The undersigned also authorizes ( ) does not authorize ( ) the Protective Committee to effect intervention by the undersigned in Civil Actions Nos. 92-205 and 98-371 presently pending in the United States District Court, Southern District of New York, and to institute or intervene, on behalf of the undersigned in any proceedings before the Interstate Commerce Commission, the Securities & Exchange Commission, and the Courts, insofar as deemed necessary by the Committee. It is understood that the undersigned will not be required personally to bear any expense incident to the institution of such proceedings and intervention in such actions or proceedings by the undersigned.

Signed this —— day of —— 1955, —— ——.

[fol. 93] The Committee Will Work Without Any Expense or Liability to You

In the event the Committee's services are beneficial to the stockholders, it will apply to the Courts or any other appropriate agency for reimbursement of its expenses and compensation for the services of its members, financial consultant, and counsel to the extent legally permissible. Both Court actions are presently in the pre-trial stage. There have been no rulings to date on any of the substantive issues of the complaints or the answers in denial thereof.

The proxy is being solicited by the Protective Committee for Common Stock holders and the cost of this solicitation is being paid for by the undersigned members of the Committee.

Please sign and mail back to us promptly the enclosed proxy. No stamp is required. It may be revoked in writing at any time.

The Protective Committee for Common Stockholders of The Alleghany Corporation, Room 1707, 100

Gold Street, New York 38, N. Y., Randolph Phillips,* Chairman; Myron Neisloss, Edward C. Sterling, Members; Rudolph Willheim, Secretary.

May 4, 1955.

[fols. 94-95] Why the Committee Appointed Randolph Phillips its Chairman and Financial Consultant

As Consultant to Alleghany (see footnote, page 10), Mr. Phillips opposed the sale of the C&O stock and control to Cyrus S. Eaton on the ground that it was not done by competitive bidding, and that the price was inadequate. He took the position that the transactions in New York Central stock for the personal profit of Young and Kirby were improper and that this profit should go to Alleghany Corporation. Mr. Young did not acquaint him with the Murchison-Richardson purchases of Central stock with Alleghany's funds until they were an accomplished fact, at which point he advised Mr. Young that he had not made

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* From 1936 to 1938 Mr. Phillips served as Special Consultant to the United States Senate Committee on Interstate Commerce, under Senators Burton K. Wheeler and Harry S. Truman. He was Financial Consultant to Thomas E. Dewey in the New York Gubernatorial Campaign of 1938. From July, 1939 to November, 1941 he was Executive Assistant to Robert R. Young, as Chairman of Alleghany Corporation, and was instrumental in overcoming the obstacles that blocked Alleghany from exercising control of The Chesapeake & Ohio Railway. During 1943 to date he has been an independent Financial Consultant.

In July, 1953 Mr. Phillips became Financial Consultant to Alleghany Corporation and the C&O. He was the first expert to be consulted by Mr. Young and Alleghany Corporation in connection with the contest for control of New York Central by the Alleghany-Young-Kirby nominees. Thereafter he was a member of the strategy board that successfully developed and executed the subsequent proxy campaign. See back cover for additional information and "Why the Committee Appointed Mr. Phillips its Chairman and Financial Consultant."

adequate disclosure to the public or the S. E. C. and insisted this be done. Mr. Young terminated Mr. Phillips' services as Alleghany's Consultant on September 30, 1954. Thereafter Mr. Young, in his own words, "arranged a stock exchange partnership" for Mr. Phillips, which he declined.

Your Committee believes the policies urged by Mr. Phillips were sound and in the best interests of Alleghany and its stockholders.

Myron Neisloss, Edward C. Sterling.

[fol. 96] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER CONVENING THREE JUDGE COURT AND TO SHOW CAUSE FOR PRELIMINARY INJUNCTION—June 15, 1955

Upon the verified complaint in the above entitled action, filed herein on June 6, 1955, and the affidavit of Randolph Phillips, affirmed June 15, 1955, it is hereby

Ordered, that a Court be constituted and convened as required by Title 28 U. S. Code, Section 2284,

Ordered, that the defendants show cause on the 23rd day of June, 1955, at 2:00 P. M., before said Court, at the United States Courthouse, Room 1306, Foley Square, New York City, why plaintiffs' application for a preliminary injunction contained in the complaint herein should not be granted, and it is further

Ordered, that service of a copy of this order upon the Attorney General of the United States, the United States Attorney for the Southern District of New York, and The Interstate Commerce Commission at Washington, D. C. be given by registered mail on June 16, 1955.

Dated: New York, N. Y., June 15, 1955.

E. J. Dimock, United States District Judge.

[fol. 97] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION OF ALLEGHANY CORPORATION FOR LEAVE TO INTERVENE—Dated June 21, 1955—Filed December 19, 1955

In accordance with the provisions of Section 2323 of Title 28, United States Code, providing in part that in suits to enjoin, set aside or annul an order of the Interstate Commerce Commission,

> "any party or parties in interest to the proceedings before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party,"

Alleghany Corporation, a corporation organized and existing under the laws of the State of Maryland, having a principal office at 230 Park Avenue, New York 17, New York, hereby respectfully moves for leave to intervene as a party defendant, and to enter the appearance of the undersigned as its counsel in the above-entitled suit.

Alleghany Corporation was a party in interest to the proceeding before the Commission in which the order here challenged was made. It was an application jointly filed by Alleghany Corporation, and The New York Central Railroad Company, controlled by it, which occasioned the Commission proceeding and resulted in the challenged order. The relief requested by plaintiffs is an injunction voiding orders of the Commission, insofar as they approve and authorize the application of Alleghany Corporation.

Rule 24(c) of the Federal Rules of Civil Procedure requires that a motion for leave to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." In this proceeding, [fol. 98] Alleghany Corporation has not yet had an ade-

quate opportunity to prepare a pleading setting forth its claim or defense. The complaint was served on the United States Attorney on June 6, 1955, and the United States, pursuant to Rule 12(a), has 60 days or until August 5, 1955, to plead. Alleghany Corporation would have at least an equivalent time within which to move to intervene and plead, since Rule 24 requires only a "timely application" for leave to intervene.

Alleghany Corporation, while wishing to appear in opposition to the motion for a temporary restraining order, does not wish to have its time to plead so seriously curtailed as to deny it an adequate opportunity to prepare its pleading. Alleghany Corporation, therefore, respectfully moves that it now be permitted to intervene without the necessity of an accompanying pleading. It represents that it will, on or before August 5, 1955, file a pleading setting forth its claim or defense, its rights and status as an interevener being defeasible in the event of its failure to do so.

If this Court believes that it cannot or should not now accord Alleghany Corporation full status as an intervener, Alleghany Corporation respectfully moves, in the alternative, that it be accorded status as an intervener for the limited purpose of opposing the motion for a temporary restraining order herein, without prejudice to its right subsequently to move for unlimited intervention.

Alleghany Corporation, By (S) Edward K. Wheeler,
(S) David W. Wallace, Its Attorneys.

June 21, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 99] CERTIFICATE OF SERVICE

(omitted in printing)

[fol. 100] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

TEMPORARY RESTRAINING ORDER—June 23, 1955

Upon the verified complaint herein and the affidavit of Randolph Phillips, affirmed June 15, 1955, the Order to Show Cause, issued herein, dated June 15, 1955, and the affidavit of George Brussel, Jr., sworn to June 23, 1955,

And it appearing from the aforesaid affidavits that irreparable damage will result if this order be not granted; it is hereby

Ordered that Alleghany Corporation, its Transfer Agents, officers, directors, servants and employees, and each of them, be and they hereby are temporarily restrained and enjoined from issuing, distributing, or transferring any of the 6% Convertible Preferred Stock of Alleghany Corporation, which is the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting so to do, until the hearing and determination by this Court of the pending motion for a preliminary injunction annulling the Order of the Interstate Commerce Commission, dated May 24, [fol. 101] 1955, in Finance Docket No. 18656; and it is further

Ordered that service of a copy of this Order, together with the affidavit of George Brussel, Jr., sworn to June 23, 1955, be sufficient, if a true copy thereof be left at the office of the Alleghany Corporation with a person of suitable age and discretion, and that service be similarly made upon any other person affected by this Order.

Dated: New York, N. Y., June 23, 1955, At 5:55 P. M.
E. J. Dimock, N. S. D. J.

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[fol. 102] AFFIDAVIT OF GEORGE BRUSSEL, JR.

STATE OF NEW YORK,
County of New York, ss.:

George Brussel, Jr., being duly sworn, deposes and says: At 4:30 P. M. this afternoon I was advised by David Hartfield, Esq. of the firm of White & Case, Esqs., who have been appearing for Alleghany Corporation and Robert R. Young in various actions and proceedings now pending before this court and in the Supreme Court, New York County, that the Interstate Commerce Commission this afternoon had approved the issuance of 1,367,440 shares of the New 6% Preferred Convertible Stock of the Alleghany Corporation and which are referred to at paragraph number 27 of the affidavit of Randolph Phillips made herein under date of June 15, 1955, in support of a motion for preliminary injunction.

This action has been taken by the Interstate Commerce Commission without according to the plaintiffs in this action the opportunity requested by them in the proceedings before the Commission, that they be given a reasonable time within which to apply to a court of competent jurisdiction for a restraint against the approval and issu-
[fols. 103-107] ance of these securities.

The decision of the court in this case will necessarily determine whether the Interstate Commerce Commission had jurisdiction to approve the issuance of these securities. If this court find, as plaintiffs contend, that no such jurisdiction lawfully exists, the issuance of the securities will be null and the rights of thousands of innocent holders may be adversely affected. The stockholders of Alleghany Corporation will also be adversely affected because, in that event, the situation will necessarily give rise to a multiplicity of suits and legal chaos to the great burden, expense and detriment of Alleghany and its stockholders.

Up till today the securities had not been issued to the persons seeking to exchange their present preferred stock for the new securities. Unless this court intervene promptly by appropriate restraining order and preserve the status quo pending submission of the issues to the three-judge court next Thursday, irreparable injury will be caused

Alleghany Corporation, its common stockholders and all persons dealing in the new securities. The new securities are now being traded on the New York Stock Exchange on a when and if issued basis at a price of approximately $33. per share, which means that the transaction may affect approximately $45,000,000 of liability to Alleghany Corporation.

No previous application for this relief has been made.

Wherefore, deponent prays for the issuance of the annexed proposed order.

* * * * * * *

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[fol. 108] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Excerpts from Stenographic Proceedings of June 24, 1955

Before: HON. EDWARD J. DIMOCK, HON. LAWRENCE E. WALSH, District Judges.

* * * * * * *

APPEARANCES:

Rosston Hort & Brussel, Esqs., Attorneys for Plaintiff Breswick & Co.; George Brussel, Jr., Esq., of Counsel.

Randolph Phillips, Esq., pro se.

White & Case, Esqs., Attorneys for Alleghany Corporation; David Hartfield, Jr., Esq., and Morton Moskin, Esq., of Counsel.

[fol. 109] Cakill Gordon Reindel & Ohl, Esqs., Amicus Curiae, representing Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder Peabody & Co., E. F. Hutton & Co., Eisle & King, Gruss & Co., Abraham & Co., Goldman Sachs & Co., Mr. Samuel Mailman, Bear Stearns & Co., Peter Lavan; Paul W. Williams, Esq., of Counsel.

* * * * * * *

[fol. 110] Mr. Hartfield: I agree with that, and I will finish just one sentence, if I may, in that regard.

The common stock after the exchange offer went up proportionately more than any other stock of this company.

We are in this position, in addition, and this is a terrible harm to us. We would like to set the annual meeting for Alleghany. In a brief submitted in the other matter that your Honor has, I say, subject to any order of this Court, we would like to fix the meeting for August 16, 1955. We do that for a variety of reasons. We have good reasons for fixing it at or about that particular date. We cannot [fol. 111] hold a meeting, because under the terms of the exchange offer, if this injunction should continue, we do not know what number of directors should be elected by what class of stock because there is still some 5½% out, 4,000 shares that were not tendered on exchange offer, because there is still some enjoined, and we cannot proceed with the regular business of this corporation and we cannot do what is necessary at the present time in order to take our proper corporate action.

Now, it seems to us, your Honor, that under these circumstances it would be fair and equitable to vacate this order because of harm which must necessarily come to us in the ordinary operation of our business and to innocent third parties and danger of multiplicity of suits. We think that if there is any triable issue to be tried before the three-judge court, let us determine that in good time, but this thing having gone forward, we cannot unscramble it. We had a contract obligation to do so. We would have had a tremendous potential liability if anything happened by nondelivery suits by stockholders for not delivering under the exchange offer. We had no other real choice.

• • • • • • •

[fol. 112] Mr. Brussel: • • • It makes little difference pecuniarily to the plaintiffs in this case whether the preferred stock issue goes out or not. Indeed, our interests are hurt by the injunction because they own common stock, they own no preferred stock, and the price of their securities would go the other way if the preferred stock is restrained.

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[fol. 113] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF REJECTION—Dated June 23, 1955—Filed December 19, 1955

SIRS:

Please take notice that the undersigned hereby rejects and returns herewith the motion of Alleghany Corporation dated June 21, 1955 for leave to intervene as a party defendant herein and to enter the appearance of Edward K. Wheeler, Esq. and David W. Wallace, Esq. as its attorneys, upon the following grounds; to wit:

1. Said motion is not properly brought on before this court, applicant having failed to file with this court a petition for leave to intervene in accordance with Atlantic Refining Co. v. Port Lobos Petroleum Corp., 280 Fed. 934 and Rule 24(c) of the Federal Rules of Civil Procedure.

2. Said motion is not accompanied by a notice of the time and place of the hearing thereon, in accordance with Rule 7(b)(1) of said Rules.

3. Said motion fails to designate an attorney having an office in the Southern or Eastern District of New York, upon whom service of papers may be made, in violation of Rule 4 of the General Rules of the United States District Courts for the Southern and Eastern District of New York.

[fol. 114] 4. Said motion is unaccompanied by an answer setting forth the defense for which intervention is sought, in violation of Rule 24(c) of the Federal Rules of Civil Procedure.

Dated: New York, June 23, 1955.

Yours, etc., Rosston, Hort & Brussel, Attorneys for Plaintiff Breswick & Co., Office & P. O. Address, 141 Broadway, New York 6, New York; Randolph Phillips, Pro Se, 53 East 74 Street, New York 21, N. Y.

To:

Alleghany Corporation, 230 Park Avenue, New York City.

David W. Wallace, Esq., c/o Alleghany Corporation, 230 Park Avenue, New York City.

Wheeler & Wheeler, Esqs., 704 Southern Bldg., Washington 5, D. C.

[fols. 115-117] AFFIDAVIT OF SERVICE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co. et al., etc., Plaintiffs,

against

UNITED STATES OF AMERICA, et al., Defendants.

STATE OF NEW YORK,

County of New York, ss.:

Mary J. Groen, being duly sworn, deposes and says that she is in the employ of Rosston, Hort & Brussel, the attorneys for plaintiff Breswick & Co. That on the 24th day of June, 1955, she served notice of rejection upon the following:

Alleghany Corporation, 230 Park Avenue, New York City

David W. Wallace, Esq., c/o Alleghany Corporation, 230 Park Avenue, New York City

Wheeler & Wheeler, Esqs., 704 Southern Bldg., Washington, 5, D. C.

by depositing true copies of the same securely enclosed in postpaid wrappers in a Post Office Box regularly maintained by the United States Government at 141 Broadway, in said County of New York, directed as above.

Mary J. Groen.

Sworn to before me, this 24th day of June, 1955.

Sarah R. Morse, Notary Public, State of New York, No. 24-8031600, Qualified in Kings County, Certificate filed in New York County, Commission Expires March 30, 1956.

[fol. 118] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE WHY ALLEGHANY'S MOTION FOR LEAVE TO INTERVENE SHOULD NOT BE GRANTED—June 27, 1955

Upon the annexed affidavit of David Hartfield, Jr., verified the 27th day of June, 1955, the complaint in this matter, the restraining order of this Court made June 23, 1955, the notice of rejection of plaintiffs of the motion of Alleghany for leave to intervene, and upon all the proceedings hitherto had herein,

Let plaintiffs show cause before this Court, at the Federal Court House, in Room 1306 thereof, Foley Square, New York, New York, on the 28th day of June, 1955, at 12 noon or as soon thereafter as counsel can be heard, why an order should not be made and entered in this cause, pursuant to Rule 24 of the Federal Rules of Civil Procedure:

(a) Granting leave to Alleghany Corporation to intervene as a defendant in this action; and

(b) Granting leave for intervenor-defendant, Alleghany Corporation, to serve an answer to plaintiffs' complaint in substantially the form set forth in Exhibit B to the affidavit upon which this order to show cause is granted.

Let service of a copy of this order to show cause and the affidavit upon which it is based upon Rosston, Hort, [fols. 119-124] & Brussel, at their office, 141 Broadway, New York, New York, before 3:00 P. M. on June 27, 1955, be deemed good and sufficient service upon both plaintiffs, and

Let service upon the Attorney-General of the United States and the Interstate Commerce Commission by mailing a copy of this order to show cause and the affidavit upon which it is based to their respective offices in Wash-

ington, D. C. and by serving a copy thereof on the United States Attorney for the Southern District of New York on or before 3:00 P. M. of the date of this order be deemed good and sufficient service.

Dated: New York, New York, June 27, 1955.

E. J. Dimock, U. S. D. J.

[fol. 125] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PROPOSED ANSWER OF INTERVENOR, ALLEGHANY CORPORATION

Intervenor, Alleghany Corporation, by White & Case, its attorneys, for answer alleges:

1. Denies each allegation contained in paragraphs 1, 7, 8, 10, 19, 24, 25, 26, 27, 28, 29 and 30 of plaintiffs' complaint.

2. Denies knowledge or information sufficient to form a belief as to each allegation in paragraph 2 of plaintiffs' complaint.

3. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of plaintiffs' complaint to the effect that plaintiffs are the beneficial owners of 700 shares of Common Stock of Alleghany Corporation (hereinafter "Alleghany"); that plaintiff, Phillips, is the Chairman of the Protective Committee for Common Stockholders of the Alleghany Corporation, of which he, one Myron J. Neisloss and one Edward C. Sterling are members, the Committee being, collectively, the beneficial owners of 1,700 shares of Common Stock and the holders of proxies from other owners of Common Stock of Alleghany; denies there is any interest of the Committee in the matters herein complained of, as set forth in Exhibit A annexed to plaintiffs' complaint and as is alleged in said paragraph 3 of plaintiffs' complaint.

[fol. 126] 4. Admits the purpose of said application was to obtain the ICC's approval and authorization of a proposed merger of the properties and franchises of Louisville

& Jeffersonville Bridge & Railroad Company into the Big Four for the purposes of ownership, management and operation and "continued control" of said properties by The New York Central Railroad Company and Alleghany; but except as herein expressly admitted, denies such allegation contained in paragraph 6 of plaintiffs' complaint.

5. Admits upon petition and supplementary petition of the SEC, the ICC permitted the SEC to intervene in the proceeding before the ICC for the limited purposes of filing a memorandum dated September 14, 1954 and a supplement thereto; but except as herein expressly admitted, denies each allegation contained in paragraph 14 of plaintiffs' complaint.

6. Denies the SEC and plaintiffs both contended unsuccessfully before the ICC in said proceeding that it was the latter's duty and obligation under the Interstate Commerce Act to dismiss or deny the application of Alleghany; and except as herein denied, admits the allegations of paragraph 15 of plaintiffs' complaint.

7. Denies Alleghany has outstanding 2,000,000 perpetual warrants to purchase Common Stock at $3.75 per share; but except as herein expressly denied, admits the allegations of paragraph 16 of plaintiffs' complaint.

For an Affirmative Defense

8. Alleghany is a real party in interest in the within entitled action.

For a Second Affirmative Defense

9. Plaintiffs' claim does not state a claim upon which relief can be granted.

[fol. 127] For a Third Affirmative Defense

10. Plaintiffs' claim and the circumstances giving rise to said claim are of such nature that plaintiffs should not have equitable relief.

For a Fourth Affirmative Defense

11. Plaintiffs have a remedy at law.

For a Fifth Affirmative Defense

12. Alleghany is a carrier or entitled to be considered as a "carrier" within the meaning of Title 49 U. S. C. A., Sections 5(2) and 5(3).

For a Claim for Affirmative Relief

13. The restraining order against Alleghany hitherto granted in this cause should be vacated because of irreparable injury to Alleghany and its stockholders.

Wherefore, intervenor-defendant, Alleghany Corporation, demand judgment dismissing plaintiffs' complaint, together with the costs and disbursements of this action, as well as the affirmative relief requested herein.

Dated: June , 1955.

White & Case, By (S) David Hartfield, Jr., A Member thereof, Attorneys for intervenor, Alleghany Corporation, 14 Wall Street, New York 5, New York.

[fol. 127a] Affidavits of Service (omitted in printing)

[fol. 128] [Memo Endorsed]—Granted June 28, 1955, C. C. Hincks, C. J., E. J. Dimock, Lawrence E. Walsh, D. J. J.

[fol. 129] [File endorsement omitted]

In United States District Court for the Southern District of New York

[Title omitted]

Answer of the United States of America—Filed August 5, 1955

Comes now the defendant United States of America and for its answer to the complaint of the plaintiffs filed in the

above-entitled cause, admits, denies, and alleges as hereinafter set forth:

1. Admits the allegations of paragraphs 1 and 2 of the complaint.

2. Answering the allegations of paragraph 3 of the complaint, this defendant admits that plaintiffs are the beneficial owners of stock in the Alleghany Corporation and alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the other allegations of said paragraph 3, and therefore neither admits nor denies such allegations.

3. Admits the allegations of paragraph 4 of the complaint.

4. Denies the allegations of paragraph 5 of the complaint, except that this defendant admits that an application under section 5(2) of the Interstate Commerce Act was filed with the Interstate Commerce Commission (hereinafter, "the Commission") on September 21, 1954, for an order approving and authorizing The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (the Big Four), and the Louisville & Jeffersonville Bridge and Railroad Company to merge their properties and franchises; and authorizing the New York Central Railroad Company [fol. 130] and the Alleghany Corporation, in view of their control of the Big Four, to acquire control of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company.

5. Answering the allegations of paragraphs 6 and 7 of the complaint, this defendant admits that the application contained a statement of the applicant's purpose, and alleges that if the applicant had any other or different purpose, this defendant was and is without knowledge thereof. This defendant further alleges that the application requested, among other things, that the Commission, in authorizing Alleghany to acquire control of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company, should include in its order a provision that Alleghany continue to be considered a carrier subject to certain designated sections of the Interstate Commerce Act. Except as hereinabove expressly admitted,

this defendant denies the allegations of said paragraphs 6 and 7.

6. Answering the allegations of paragraph 8 of the complaint, this defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth thereof, and it therefore neither admits nor denies such allegations.

7. Admits the allegations of paragraph 9 of the complaint.

8. Answering the allegations of paragraph 10 of the complaint, this defendant admits that by order dated May 24, 1955, the Commission permitted plaintiffs to intervene in the proceedings on said application, that the order of February 15, 1955, denied a petition filed by plaintiff Breswick & Company for leave to intervene, and that the order of March 2, 1955, dismissed an amended petition filed by Breswick & Company for leave to intervene. Except as hereinabove expressly admitted, this defendant denies the allegations of said paragraph 10.

[fol. 131] 9. Answering the allegations of paragraph 11 of the complaint, this defendant admits that by its report and order dated March 2, 1955, Division 4 approved and authorized the transaction proposed in the said application, subject to certain conditions set forth in the said report and order, and dismissed an amended petition filed by plaintiff Breswick & Company for leave to intervene.

10. Answering the allegations of paragraph 12 of the complaint, this defendant admits that on March 21, 1955, plaintiff Breswick & Company again petitioned the Commission for leave to intervene in said proceeding, and that on March 20, 1955, plaintiff Randolph Phillips filed a petition, and on April 11, 1955, both plaintiffs filed an amended petition, for leave to intervene and for reconsideration by the entire Commission of the said report and order of Division 4; otherwise, this defendant denies the allegations in paragraph 12.

11. Answering the allegations of paragraph 13 of the complaint, this defendant admits that by its report and order of May 24, 1955, the entire Commission affirmed the previous order of Division 4 approving and authorizing the transactions proposed in the said application, but for a more complete statement of the effect of the decision, this

defendant respectfully refers the Court to the said report and order of May 24, 1955, copies of which are attached to the complaint herein as Exhibits B-1 and B-2.

12. Admits the allegations of paragraphs 14 and 15 of the complaint.

13. Answering the allegations of paragraphs 16, 17 and 18 of the complaint, this defendant alleges that it is without knowledge or information sufficient to enable it to form a belief as to the truth thereof, and therefore neither admits nor denies such allegations.

14. Denies the allegations of paragraph 19 of the complaint.

[fol. 132] 15. Admits the allegations of paragraphs 20, 21, 22 and 23 of the complaint.

16. Answering the allegations of paragraph 24 of the complaint, this defendant admits the filing of the several petitions and pleadings described in said paragraph 24, but denies that it appears from such petitions and pleadings that the granting of said application of Alleghany without a preliminary evidentiary hearing upon the merits would not be in the public interest.

17. Answering the allegations of paragraph 25 of the complaint, this defendant admits that the Commission did not conduct an evidentiary hearing and that by its order of May 24, 1955, the Commission approved said application of Alleghany.

18. Denies the allegations of paragraphs 26, 27, 28, 29 and 30 of the complaint.

19. Further answering the allegations of the complaint, this defendant alleges that the findings and conclusions set forth in the Commission's reports of March 2, 1955, and May 24, 1955, are fully supported by the evidence; that said orders are fully supported and justified by the findings of the Commission; that in making its said reports and orders the Commission carefully considered the national transportation policy and considered and weighed carefully, in the light of the criteria fixed by law, and in the light of its own knowledge and experience, each fact and circumstance brought to its attention by or on behalf of the parties to the proceedings; that in making said reports and orders the Commission did not act arbitrarily or exceed its authority; that said orders of the Commission are

lawful and valid in all respects, and this defendant denies each and every allegation to the contrary contained in the complaint herein.

[fol. 133] Wherefore, having fully answered, this defendant prays that the relief sought in the complaint be denied and that the complaint be dismissed.

Stanley N. Barnes, Assistant Attorney General.
Lloyd F. MacMahon, United States Attorney.

Albert Parker, John H. D. Wigger, James H. Durkin, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 134] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION, DEFENDANT—Filed August 1, 1955

For answer to the complaint herein, the Interstate Commerce Commission, defendant:

1.

Admits the allegations in paragraphs 1, 2 and 4.

2

Admits the allegations in paragraph 3 that the plaintiffs are the beneficial owners of stock in the Alleghany Corporation, but neither admits nor denies the allegations as to the amount of such stock owned by the plaintiffs and as to the interest of the plaintiffs in the matters complained

of by them, being without knowledge thereof other than the plaintiffs' allegations.

3

Answering paragraph 5, the Commission alleges that the true facts are that an application under section 5(2) of the Interstate Commerce Act was filed with the Commission on September 21, 1954, for an order approving and authorizing The Cleveland, Cincinnati, Chicago and St. Louis [fol. 135] Railway Company (the Big Four), and the Louisville & Jeffersonville Bridge and Railroad Company (the Bridge Company) to merge their properties and franchises; and authorizing The New York Central Railroad Company (Central), and the Alleghany Corporation (Alleghany), in view of their control of the Big Four, to acquire control of the properties and franchises of the Bridge Company; and that said application was assigned Finance Docket No. 18656; otherwise the Commission denies the allegations in said paragraph.

4

Answering paragraphs 6 and 7, the Commission alleges that the application contained a statement of the applicants' purpose and alleges further that if the applicants had any other or different purpose, the Commission was and is without knowledge thereof. The application requested, among other things, that the Commission in authorizing Alleghany to acquire control of the properties, etc., of the Bridge Company, should include in its order a provision that Alleghany continue to be considered a carrier subject to certain named sections of the Interstate Commerce Act. The Commission alleges further that by two memoranda and a petition for reconsideration duly filed in the said proceeding, the Securities and Exchange Commission urged the Interstate Commerce Commission, in the exercise of its discretion, not to consider Alleghany a carrier subject to regulation under the Interstate Commerce Act but to permit Alleghany to return to regulation by the Securities and Exchange Commission under the Investment Company Act.

5

Denies the allegations in paragraph 8.

[fol. 136] 6

Admits the allegation in paragraph 9.

7

Answering paragraph 10, the Commission admits that by order dated May 24, 1955, it permitted plaintiffs to intervene in the said application proceeding (Finance Docket No. 18656), but as to the previous orders referred to, alleges the facts to be as follows: (1) The order of February 9, 1955, did not deny any application or petition for intervention filed by the plaintiffs or either of them, or otherwise pass upon any such application or petition; (2) the order of February 15, 1955, did deny a petition filed by plaintiff Breswick & Company for leave to intervene, but did not deny or otherwise pass upon any such petition or application by plaintiff Randolph Phillips, no such petition or application having been filed by the said Phillips at that time; (3) the order of March 2, 1955, did dismiss an amended petition filed by Breswick & Company for leave to intervene, but did not deny or dismiss or otherwise pass upon any petition by Randolph Phillips, no such petition being filed by him in the said proceeding until March 28, 1955.

8

Admits that by its report and order of March 2, 1955, the Commission, Division 4, approved and authorized the transactions proposed in the said application, subject to certain conditions set forth in the said report and order; as to the remaining allegations in the said paragraph, the Commission alleges that the plaintiffs were not parties to the said proceeding when the said report and order were issued.

9

Admits, in answer to paragraph 12, that on March 21, 1955, plaintiff Breswick & Company again petitioned the Commission for leave to intervene in the said proceeding,

[fol. 137] and that on March 20, 1955, plaintiff Randolph Phillips filed a petition, and on April 11, 1955, both plaintiffs filed an amended petition, for leave to intervene and for reconsideration by the entire Commission of the said report and order of Division 4; otherwise, the Commission denies the allegations in paragraph 12.

10

Admits, in answer to paragraph 13, that by its report on reconsideration and its order of May 24, 1955, the entire Commission affirmed the previous order of Division 4 approving and authorizing the transactions proposed in the said application; but for a more complete statement of the effect of the said decision, the Commission respectfully refers the Court to the text of its said report and order, copies of which are attached to the complaint herein as Exhibits B-1 and B-2.

11

Admits the allegations in paragraphs 14 and 15.

12

Neither admits nor denies the allegations in paragraphs 16, 17 and 18, being without knowledge as to the truth thereof; but alleges that the said allegations, if true, are irrelevant to a proper determination of the issues in this action.

13

Denies the allegation in paragraph 19.

14

Admits the allegations in paragraphs 20, 21, 22 and 23.

15

Admits the filing of the several petitions and other pleadings described in paragraph 24, but denies the allegation therein and any implication therefrom to the effect that [fol. 138] granting the said application of Alleghany and others without a hearing would not be in the public interest.

16

Admits, in answer to paragraph 25, that it conducted no "evidentiary hearing" before reaching its decision in the said proceeding; and alleges that it was not required by the applicable statute (section 5(2)(b) of the Interstate Commerce Act) to set the said application for public hearing in the event it (the Commission) determined, as it did, that a public hearing thereon was not necessary in the public interest.

17

Denies the allegations in paragraphs 26, 27, 28, 29 and 30.

18

Further answering the complaint, the Commission alleges that the findings and conclusions set forth in its reports of March 2, 1955, and May 24, 1955, upon which the orders assailed by the plaintiffs are based, were and are, and each of them was and is, fully supported and justified by the evidence submitted in the said proceeding and by the law applicable thereto; and that in making its said reports and the said orders the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition brought to its attention by or on behalf of the parties to the said proceeding. The Commission further alleges that the said reports and orders were not made or entered either arbitrarily or unjustly, or without substantial evidence to support them, or contrary to the relevant evidence, or otherwise than in conformity with the applicable statutes; and that in making said reports and orders the Commission did not exceed the authority conferred upon it by law. The Commission [fol. 139] denies each of and all the allegations to the contrary contained in the said complaint, and expressly denies that its said reports and orders here under attack are invalid or illegal for any of the reasons set forth in the said complaint, or for any other reason.

All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall

direct, and hereby prays that the said complaint be dismissed.

Samuel R. Howell, Acting General Counsel, Leo H. Pou, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

[fol. 140] Certificate of Service (omitted in printing)

[fol. 141] [File endorsement omitted]

In United States District Court for the Southern District of New York

[Title omitted]

Order to Show Cause Why Leave Should Not Be Granted Joseph S. Gruss, et al., to Intervene, etc.—June 27, 1955

Upon the annexed affidavit of Charles H. Blatt, verified the 27th day of June, 1955, the annexed proposed answer of the intervenors, the complaint herein, the restraining order of this Court, dated June 23, 1955, and upon all the proceedings heretofore had herein,

Let plaintiffs show cause before this Court, at the U. S. Court House, in Room 1306 thereof, Foley Square, New York, New York, on the 28th day of June, 1955, at 12 noon, why an order should not be made and entered in this cause, pursuant to Rule 24 of the Federal Rules of Civil Procedure:

(a) granting leave to Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delair, a copartnership doing business as Gruss & Co., to intervene herein and to be made a party hereto and to serve an answer in the form annexed;

(b) advancing the hearing on plaintiffs' motion for a preliminary injunction from June 30, 1955, to 2 P. M. on June 28, 1955;

(c) vacating the restraining order herein;

(d) in the alternative, in the event that said restraining order be not vacated (or a temporary in-
[fol. 142] junction be issued) requiring plaintiffs to post an adequate bond to indemnify the intervenors and other preferred stockholders similarly affected, and

Let service of a copy of this order to show cause and the pleading upon which it is based upon Rosston, Hort & Brussel, at their office, 141 Broadway, New York, New York, before 2:30 P. M. on June 27, 1955, be deemed good and sufficient service upon both plaintiffs, and

Let service upon the defendants United States of America and the Interstate Commerce Commission by service upon the United States Attorney for the Southern District of New York and the New York office of the Interstate Commerce Commission, (together with telephone notice to the Attorney General's and Interstate Commerce Commission's offices in Washington, D. C.), of a copy of this order to show cause and the affidavit and pleading upon which it is based on or before 3:00 P. M. on June 27, 1955 be deemed good and sufficient service.

Dated: New York, N. Y., June 27th, 1955.

E. J. Dimock,
U. S. D. J.

[fol. 143] AFFIDAVIT OF CHARLES H. BLATT

STATE OF NEW YORK,
County of New York, ss.:

Charles H. Blatt, being duly sworn, says:

1. I am a member of Gruss & Co., a copartnership consisting of Joseph S. Gruss, Albert B. Cohen, Arthur A. Winner, Alvin J. Delaire and myself. Said firm's offices are located in the Southern District of New York, at 30 Broad Street, City and State of New York. It is a member of the New York and American Stock Exchanges.

2. Said copartnership, until June 6, 1955, was the owner of 1,100 shares of the cumulative 5½% preferred stock,

Series A, of Alleghany Corporation (hereinafter designated as "old" or "Series A preferred"), by which date said shares were delivered for exchange for 11,000 shares of 6% convertible preferred stock (hereinafter designated as "new" or "6% preferred").

3. Said copartnership asks leave to intervene in the above-entitled action for itself individually and on behalf of other holders of said new or 6% preferred stock similarly situated who find themselves aggrieved by an *ex parte* [fol. 144] restraining order obtained herein by plaintiffs on June 23, 1955, which enjoins the issuance or transfer of said securities.

4. Pursuant to the exchange offer made by the Alleghany Corporation, approved by the defendant Interstate Commerce Commission on May 26, 1955, and reaffirmed upon plaintiffs' application for reconsideration by order of said Commission dated June 22, 1955, our firm delivered said 1,100 shares of Series A preferred stock of Alleghany Corporation to the Exchange Agent, The Marine Midland Trust Company of New York.

5. We received in exchange for 1,000 shares of said old Series A stock 10,000 shares of the new 6% preferred stock but have not yet received the additional 1,000 shares to which we are entitled.

6. I am informed that, following the making of said order of the Interstate Commerce Commission on June 22, 1955, approximately 900,000 shares of the new 6% preferred stock were delivered by said Exchange Agent in exchange for corresponding amounts of the old stock but that 400,000 shares of said new stock have not yet been delivered.

7. Late in the afternoon of June 23, 1955, plaintiffs obtained an *ex parte* restraining order herein, restraining the Alleghany Corporation and those acting on its behalf "from issuing, distributing or transferring any of the 6% convertible preferred stock of Alleghany Corporation" until the hearing and determination of a pending motion for a preliminary injunction in the above-entitled action. [fol. 145] 8. I am informed that, at the time the continuance of the injunction herein was under consideration, the Court was informed—or misinformed—by plaintiffs that the issuance of the restraining order would not affect trad-

ing on the New York Stock Exchange. Despite said assurances, the New York Stock Exchange, shortly after noon on Friday, June 24, 1955, upon being advised of the restraining order, suspended trading in the said new preferred stock.

9. Upon the original approval of the exchange offer herein by the defendant Interstate Commerce Commission on or about May 26, 1955, said new stock was traded on a "when issued" basis in the over-the-counter market and commencing on the 8th day of June, it was traded on a "when issued" basis on the New York Stock Exchange. At least 100,000 shares were thus traded. Upon plaintiffs' intervention and application for a rehearing, the consummation of the exchange offer was stayed pending determination. During this interval, trading continued on a "when issued" basis until the order of the Interstate Commerce Commission was made on June 22, 1955, whereupon the stock became eligible for trading and was traded on an actual basis commencing June 24, 1955.

10. A substantial number of shares of the new preferred stock were traded on the New York Stock Exchange on June 24, prior to notice of the issuance of the restraining order herein. Delivery and settlement date for these transactions —as well as transactions theretofore made on a "when issued" basis—was set by the New York Stock Exchange for Wednesday, June 29, 1955. This is *one day before* the date set for the hearing of plaintiff's motion for a pre-
[fol. 146] liminary injunction herein.

11. As a result of the issuance of said *ex parte* restraining order, brokers such as our firm will not be able to deliver the securities which they have sold; nor will they be in a position to receive payment therefor. Absent the restraining order, our firm would be entitled to receive on June 29, 1955, the sum of approximately $250,000 for new preferred stock sold by us. In reliance upon our expectation of the receipt of this sum on said delivery date, our firm made commitments and the absence of the receipt of that sum, if the injunction herein is not lifted by June 29, will do us irreparable damage.

12. Our firm finds itself in an embarrassing position by virtue of its having purchased stock for customers upon their deposit of the required margin. We are not in a

position to fulfill our obligations to these customers; nor are we able to protect ourselves against loss in view of the absence of any proper market for said securities.

13. This Court may take judicial notice of the difficulties, hardships and uncertainties that necessarily flow from the freezing, by the restraining order, of securities having a value in excess of forty million dollars. A stockholder need-
[fol. 147] ing cash is not in a position to sell his stock. Brokers are unable to meet their requirements. Those who have sold said new stock will not receive the cash to which they are entitled, as they would except for the issuance of the restraining order herein. Many thousands of shares of the old preferred stock were undoubtedly pledged with banks and brokers, who, at the request of the stockholders, surrendered the old stock in anticipation of the receipt of the new. The restraining order prevents the consummation of these transactions with the result that preferred stockholders in such position will undoubtedly be called upon to post other collateral. Indeed, our firm is in this very position.

14. Said restraining order does not maintain the status quo, but creates a havoc and uncertainty which defies description. For example, all but 4,000 of the old shares of preferred stock of the Alleghany Corporation have been cancelled and, I am informed, cannot be reissued under laws of Maryland, the State of incorporation of Alleghany Corporation. The new stock has no market value, since the restraining order has destroyed any proper market. Until the injunction is lifted, no one will be in a position to buy, sell, trade in or hypothecate these securities.

15. This Court undbou-tedly issued the restraining order herein in order to avoid irreparable damage, but, as appears from what has been hereinbefore set forth, the effect of the continuance of this restraining order beyond June 29, 1955, will cause irreparable damage far beyond the contemplation of the Court at the time it issued the injunction herein.

[fol. 148] 16. From the foregoing, it is clear that the parties most vitally affected by the issuance of the restraining order herein and who will be most affected by the motion for a preliminary injunction now set for June 30, 1955, are preferred stockholders in the position of our firm—the

holders of the new preferred stock or those who are entitled to hold it.

17. Plaintiffs have been required to post a bond of only $1,000 to indemnify the Alleghany Corporation and *no* bond to indemnify the preferred stockholders, who are directly and seriously affected.

18. Whereas plaintiffs allegedly represent .002% of the common stockholders of the Alleghany Corporation, 97.5% of common stockholders voting at the meeting called therefor approved the exchange offer herein. Thus, almost unanimously, the voting common stockholders believed that the exchange plan is a good one. [It adds approximately $3.80 to the book value of each common share and makes it possible for the corporation to declare dividends on such common stock (see findings of the Interstate Commerce Commission in its report dated May 26, 1955—sheet 19).] The market reflected this attitude. The common stock sold —in the short interval between the announcement of the I. C. C. approval of the exchange and the issuance of the restraining order—at its highest level in at least 25 years.

19. The members of our firm are entitled, therefore, to intervene and should be permitted to intervene in this proceeding, both as individuals and as representative of the preferred stockholders similarly situated, who stand to suf- [fol. 149] fer irreparable damage, unless the restraining order herein is lifted or a determination made before the delivery date, June 29, 1955, as aforesaid.

Wherefore, I respectfully pray, on behalf of my firm and other preferred stockholders similarly situated and aggrieved, that an order be entered herein

(a) permitting Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, copartners doing business under the firm name and style of Gruss & Company, to intervene herein and to be made a party hereto, and to serve an answer in the form annexed;

(b) advancing the hearing on plaintiffs' motion for a preliminary injunction from June 30, 1955, to 2 P. M. on June 28, 1955;

(c) vacating the restraining order herein;

(d) in the alternative, in the event that said restraining order be not vacated (or a temporary injunction be

issued) requiring plaintiffs to post an adequate bond to indemnify the intervenors and other preferred stockholders similarly affected;

for all of which relief petitioners have no adequate remedy at law and for which no previous application has been made in this or any other Court.

Charles H. Blatt.

* * * * * * *

Duly sworn to by Charles H. Blatt. Jurat omitted in printing.

[fol. 150] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PROPOSED ANSWER AND CROSS-COMPLAINT—
Filed June 29, 1955

Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business as Gruss & Company, intervening herein on behalf of themselves and on behalf of holders of the 6% convertible preferred stock of the Alleghany Corporation similarly situated, for their answer to the complaint herein, and by way of cross claim, by Proskauer Rose Goetz & Mendelsohn, their attorneys, allege:

1. These intervening defendants, being without knowledge or information sufficient to form a belief respecting the material allegations of plaintiffs' complaint, neither admit nor deny such allegations, except that they deny the allegations of paragraphs "26" to "30" inclusive.

2. Plaintiffs and other holders of said 6% convertible stock of the Alleghany Corporation (hereinafter designated "new preferred") have been and are being irreparably damaged by the restraining order issued by this Court, which restrains the issuance, distribution and trans-

fer of said stock and which has caused a suspension of trading in said stock on The New York Stock Exchange.

3. The intervening defendants and other holders of said [fol. 151] new preferred stock similarly situated will be irreparably damaged by the continuance of said restraining order or the issuance of a preliminary or permanent injunction herein.

4. Said restraining order and any further injunction herein cannot maintain the status quo for the protection of all interested parties, by virtue of the fact that the deposited stock under the exchange offer no longer exists, the same having been cancelled and is not reissuable under the laws of Maryland, the state of incorporation of the Alleghany Corporation.

Wherefore, the intervenors herein respectfully pray that they be permitted to intervene in this action as defendants, that the complaint herein be dismissed, that the restraining order herein by vacated and that these intervenor defendants receive such other and further relief as to the Court may seem just and proper.

Proskauer Rose Goetz & Mendelsohn, By Harold H. Levin, a member of the firm, Attorneys for Joseph S. Gruss, et al., doing business as Gruss & Company, Office & P. O. Address 11 Broadway, New York 4, N. Y.

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* * * * * * *

[fol. 152] AFFIDAVIT OF SERVICE

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss.:

Chester Stiles, being duly sworn, deposes and says:

That he is over the age of twenty-one years and is associated with the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the moving parties.

That on the 27th day of June, 1955, at approximately 1:15 P. M. at No. 346 Broadway, in the Borough of Man-

hattan, City and County of New York, deponent personally served the annexed affidavit, proposed answer and order to show cause upon the Interstate Commerce Commission by delivering to and leaving with one George Vale (Room 1106), a true copy of each thereof.

That at the time of said service, deponent knew the Commission so served to be the commission mentioned in said order and knew the said George Vale to be the head of the Bureau of Accounts, Cost Finding and Valuation.

Deponent further says that at the time of making said [fol. 153] service, he exhibited to the said George Vale, the annexed original to show cause dated the 27th day of June, 1955 and the signature of Hon. E. J. Dimmock thereto affixed.

Chester Stiles.

Duly sworn to by Chester Stiles. Jurat omitted in printing.

[fol. 154] AFFIDAVIT OF SERVICE

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss.:

Chester Stiles, being duly sworn, deposes and says:

That he is over the age of twenty-one years and is associated with the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the moving parties.

That on the 27th day of June, 1955, at No. 141 Broadway, in the Borough of Manhattan, City and County of New York, at approximately 1:45 P. M., deponent personally served the annexed affidavit, proposed answer and order to show cause upon Messrs. Rosston, Hort and Brussel, pursuant to the provisions of said order to show cause, by delivering to and leaving with one Mary Groen, the telephone operator in and the person having charge of the office of the said firm at the said address, a true copy thereof.

Deponent further says, that at the time of making said service, he exhibited to the said Mary Groen the annexed original order to show cause dated the 27th day of June, [fol. 155] 1955, and the signature of Hon. E. J. Dimmock thereto affixed.

That on the 27th day of June, 1955, at approximately 1:45 P. M. at No. 141 Broadway, in the Borough of Manhattan, City and County of New York, deponent personally served the annexed affidavit, proposed answer and order to show cause upon Randolph Phillips, to deponent known to be one of the plaintiffs in the above-entitled action, by delivering to and leaving with the said Randolph Phillips in person a true copy of each thereof.

Deponent further says that, at the time of making said service, he exhibited to the said Randolph Phillips, the annexed original order to show cause dated the 27th day of June, 1955 and the signature of Hon. E. J. Dimmock thereto affixed.

Deponent has been informed by Harold Levin, Esq., a member of the firm of Proskauer Rose Goetz & Mendelsohn, and believes, that pursuant to the terms of the said order of June 27, 1955, the said Harold Levin gave telephone notice to the Attorney General's office and to the Interstate Commerce Commission's office in Washington, D. C., on June 27, 1955, prior to 3:00 P. M., advising each of them as to the nature of the relief sought and the time and place when the motion brought on by the said order to show [fols. 156-157] cause was scheduled to take place.

Chester Stiles.

* * * * * * *

Duly sworn to by Chester Stiles. Jurat omitted in printing.

[fols. 158-160] MEMO ENDORSED

ACTION ON RULE TO SHOW CAUSE—Filed June 28, 1955

Motion disposed of as follows:

Paragraph (a): Granted; Paragraph (b): Granted; Paragraph (c): Denied, Circuit Judge Hincks dissenting, without prejudice to submission of orders as indicated on argument, Paragraph (d): Denied.

June 28, 1955.

C. C. Hincks, C. J., E. J. Dimock, Lawrence E. Walsh, D. J. J.

[fol. 161] UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Extracts from Stenographic Proceedings of June 28, 1955

Before: HON. CARROLL C. HINCKS, Circuit Judge, HON. EDWARD J. DIMOCK, and HON. LAWRENCE E. WALSH, District Judges.

* * * * * * *

APPEARANCES:

Rosston, Hort & Brussel, Esqs., Attorneys for Plaintiff Breswick & Co.; George Brussel, Jr., Esq., of Counsel.
Randolph Phillips, pro se.

White & Case, Esqs., Attorneys for Alleghany Corporation; David Hartfield, Jr., Esq., Andrew Q. Miller, Esq., and Morton Moskin, Esq., of Counsel.
[fol. 162] Cahill, Gordon, Reindel & Ohl, Esqs., Amicus Curiae, representing Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder, Peabody & Co., E. F. Hutton & Co. Eisle & King, Gruss & Co., Abraham & Co., Goldman, Sachs & Co., Mr. Samuel Mailman, Bear, Stearns, Peter Lavan; Paul W. Williams, Esq., of Counsel.
Wheeler & Wheeler, Esqs., Attorneys for New York Cen-

tral Railroad and Alleghany Corporation; Edward K. Wheeler, Esq., of Counsel.

Leo H. Pou, Esq., Attorney for Interstate Commerce Commission.

James H. Durkin, Esq., Special Assistant to the Attorney General, for United States of America.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for Gruss & Co.; Harold H. Levin, Esq., of Counsel.

Arthur H. Bernstein, Esq., Attorney for New York Central Railroad.

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* * * * * * *

[fol. 163] Mr. Brussel: Well, the common stockholders who have brought this proceeding and those who may join with them certainly have an interest, because the common stockholders who are here in this case have invoked the jurisdictional question, and only persons who are allied in interest with them are before the Court derivatively. The preferred stockholders are a separate class of security-holders, affected by the result.

* * * * * * *

[fol. 164] Judge Hincks: The Court will grant the petition of Alleghany to intervene.

* * * * * * *

[fol. 165] COLLOQUY BETWEEN COURT AND COUNSEL

Judge Hincks: I don't think that branch of the argument is necessary now.

Mr. Hartfield: Well, all I want to say is that when stockholdings are small, our jurisdiction in New York holds that the Court should scrutinize the situation——

Judge Dimock: Well, you gentlemen are dealing at arm's length. Mr. Hartfield succeeded in getting out some stock. Mr. Brussel succeeded in getting a restraining order. You are both entitled to the legal rights and advantages you get. Isn't there somebody that can work

some scheme out so we can keep you in status quo while we decide the issues tendered?

Mr. Levin: The trouble is that there was no status quo when the order was issued. I am not criticizing the issuance of the restraining order. I am sure when you issued it you thought you were maintaining the status quo, but you are maintaining a suspension in mid-air with respect to thousands of stockholders and millions of dollars.

Judge Dimock: That is exactly as I understand it. The trouble is it is in the middle. Isn't there somebody who [fol. 166] can work out something?

Mr. Levin: I am only a lawyer, your Honor, and I can't conceive of anything that would work this out with the structure we are left with. I think that is something your Honors have to take into consideration. We do have a market. We do have a Stock Exchange. We do have securities that have to be transferred, and it has to be done quickly and with expedition, and this order, of course, prevents it. Now, I don't see any way of resolving this and I urge upon your Honors that you give some thought to the other side of the coin: What damage is Mr. Phillips going to sustain? What damage?

Judge Hincks: I have been waiting some time for a chance to ask him.

Mr. Phillips: Your Honor, I am glad to answer the question. Mr. Brussel did refer to some Supreme Court cases, but I would like to call attention to 154 Fed. (2d). There has been a steady development of the Supreme Court——

Judge Hincks: Well, specifically how are you going to be hurt if we rescind the stay order? Just what will it do to you?

Mr. Phillips: It will do the following: It will release [fol. 167] $45,000,000 worth of stock which can never be recalled. It will dilute our stock by 10,000,000 shares. It will prevail immediately over the equity of the common stock, and I know there are a lot of defense petitions to the contrary, but they are not fair and accurate. It will immediately take out of the equity of the common stock $15,000,000 of profit above the maximum legal claim of the preferred stock and put that into the hands of the preferred stockholders, of which Mr. Young owns 10 per cent, which he acquired. That will be lost. Those warrants will

be lost. They cannot be recalled. Those warrants are in terms prohibited by the Investment Company Act. This new stock so-called combines the warrant which is illegal under the Investment Company Act with preferred stock. That warrant, sir, is exercisable on the payment of $3.75 a share. The stock is now selling at $10 on the American Exchange, formerly known as the Curb. The same kind of warrant is now traded and is worth $7. The Series A preferred stockholder gets in this deal and he has a maximum legal claim of $237, according to the Wallace affidavit of yesterday. The maximum legal claim on the liquidating [fol. 168] value or par value plus arrearages which are roughly $137; it is $100 par value. What does the preferred stockholder get? He gets the right to subscribe to 47 shares of new common stock. That right could be worth $7 per share on the American Exchange as at the close yesterday. That is $329 right there. He gets $329 in available market value to satisfy a legal claim of $237. We informed the Interstate Commerce Commission that this is the rankest manipulation. There isn't a single case to support——

Judge Hincks: Well, you are getting over on to the merits. Is there anything further?

Mr. Phillips: No.

Judge Hincks: Have you anything to say on that, Mr. Brussel?

Mr. Brussel: Yes. There is another respect in which we are injured: If we are right in this case that the Securities and Exchange Commission has jurisdiction, we are entitled to the facilities of the Securities and Exchange Commission by way of an advisory report that may be requested if 25 per cent of the stockholders should request it. We are entitled to all the benefits and protection [fol. 169] of the Investment Company Act regulating these issued securities which was denied to us under the Interstate Commerce Commission Act. That is the whole basis of this lawsuit. The gravamen of our case is that the regulatory jurisdiction which should have acted failed to act, and failed to act under a lack of appreciation of the legal consequences of the sale of the Chesapeake & Ohio System by Alleghany in January 1954. If we are right as to that we have lost not only the monetary value inherent in the

dilution of the common stock because ne- stock is being issued in order to satisfy the preferred stock transaction. It is being diluted in that sense, and we have lost the bonus that goes to the preferred stockholders as a result of this transaction. It has to come from somewhere, your Honor; it doesn't come from thin air. There isn't any other place.

Now if I may, I want to address myself to a remark which was made by counsel, I don't remember which one—someone said, I think it was counsel for the stock brokerage firms seeking to intervene—he says that we will take our chances on vacating the restraining order. What he meant is we will take our profits because all that is at stake in forcing us to go on in attempting to vacate the [fol. 170] restraining order is an attempt by the preferred stockholders, who stand in the shoes of their assignors or the shoes of the Alleghany Corporation—all that is involved is an attempt by them to make some very enormous profits. They are considerable. The legality of this could have been decided a long time ago if we had been allowed to intervene before the Commission.

May I say one more thing? Your Honors, two months ago I notified the New York Stock Exchange of the pendency of this litigation, of the lawsuit before Judge Walsh. I called their attention to the fact that the preferred stock, the validity of the preferred stock was going to be attacked. I gave the ground on which the attack was going to be made. I called their attention to what I considered to be serious misstatements in the last statement of Alleghany in which they said counsel advised them that no material litigation was pending. I thought that was outrageous. Despite that Alleghany's brokers proceeded on their way, and they complain now that they are being hurt.

* * * * * * *

[fol. 171] Judge Hincks: What do you say about the observation that Alleghany was under a contractual obligation to deliver the stock? Would a decree of the Court absolve it from damages for failing to deliver?

Mr. Brussel: The restraining order is a complete defense to the delivery. Alleghany Corporation was under contract, and Mr. Hartfield admitted in answer to a question by Judge Dimock last Friday that he couldn't perform by

virtue of the restraining order and that would operate as a defense. We think the solution of this problem is to direct Alleghany Corporation to re-accept this stock, let the when, as and if status be recreated, and let the holders [fols. 172-173] of the stock be determined at a later date. No one can be hurt by that arrangement.

* * * * * * *

[fol. 174] Judge Walsh: Mr. Hartfield, why wouldn't it preserve the status quo if an arrangement could be worked out for an order providing that the certificates which had been issued should be recalled pending an early decision on the merits on the preliminary injunction?

Mr. Hartfield: The question you ask is so vast that I couldn't answer it for you at the moment. * * * bear in mind that 97½ per cent of the common stock after the fullest disclosure approved this plan.

* * * * * * *

[fol. 175] Judge Dimock: Your position is that when you got one share of stock out before the injunction came out that that was the end of it. Your opponents wanted to prevent the issuance of that stock because they said that stock was going to be invalid. That was their object. You say you got one share out, and it is so impossible to unscramble that situation, that prevented the presentation of this question to the Court?

Mr. Hartfield: Sir, I am afraid I haven't made plain that that isn't the situation at all. The issue tendered before you, please keep that in mind, is should the ICC consider the Alleghany as a carrier or should Alleghany be [fols. 176-177] considered under the Investment Company Act? Sir, it can't be an Investment Company Act immediately because the SEC has to go through a formal hearing to make it one so that the stock would be validly issued, but my point is that the issues in this case have nothing to do with the exchange offer. If your Honor said to me now, "Mr. Hartfield, you are all wrong. I think the ICC should have had nothing to do with this whatsoever and we order that they do not." Then, sir, that still doesn't affect the validity of the stock. That is not tendered to you in the

pleadings. Why, then, are we enjoined? May I suggest this, and I do this most humbly: The plaintiff represents 700 shares of common stock. Don't put them on the board of directors of our company. We don't want them. They don't represent enough stock. This is not a corporate democracy where an order of this Court takes a stockholder who has not been elected and in effect makes him a majority. We did this. Let them sue us, but I say that has nothing to do with the issues tendered by the pleadings. If the ICC does not have jurisdiction over us that doesn't affect the exchange offer one way or the other.

* * * * * * *

[fol. 178] Mr. Brussel: It is relevant in, this sense, your Honor, that we are here on behalf of the securities, or, in the right of the Securities and Exchange Commission which, under Goldstein v. * * *

* * * * * * *

[fol. 179] Parenthetically I say to the Court that the Securities and Exchange Commission, while it did not embrace our position on the mandatory aspect of jurisdiction, thought that all of the circumstances required the Interstate Commerce Commission to surrender Alleghany to the regulation of that commission. * * *

* * * * * * *

[fol. 180] Judge Walsh: What order of the Interstate Commerce Commission authorized Alleghany to acquire control of any carrier?

Mr. Wheeler: The order in this case. The order in this case. We filed the application and asked the Commission for authorization to control the Big Four with the properties of the L & J merged into it.

And the Commission authorized that application to control the Big Four.

* * * * * * *

[fol. 181] RULINGS ON SHOW CAUSE ORDER

Judge Hincks: With respect to that portion of the show cause order that seeks to have the stay vacated, the Court finds it is in disagreement, and in view of the fact I will ask Brother Dimock to announce the majority opinion.

Judge Dimock: The majority rules that a stay will be continued but that is without prejudice to an application that any of the parties may be advised to make to so relax the stay as to cause the least possible damage, and at the same time give to the plaintiff the protection which a majority of the Court think he is entitled to, and as an example of what occurs to somebody who is a layman so far as stock exchange practice is concerned—this might help in that emergency—I suggest that you consider something like this: that the stay be relaxed to the extent of permitting when, as and if issued, trading in the new preferred stock, and permitting the exchange agent to receive back the new preferred stock which has been issued and to issue receipts for it in substantially the same form as the old receipts which had been used for the old preferred stock prior to Interstate Commerce Commission approval of the exchange.

* * * * * * *

[fol. 182] Judge Hincks: * * * If counsel have no interest in trying to devise the form of a relaxed order, a modification of the stay, we have only to fix the date for the continued hearings on the merits of the preliminary [fol. 183] injunction.

If however, counsel want to take advantage of the opportunity to submit a modification of the order and desire to have a full Court present to hear their proposals, it would be desirable to fix a date now.

Mr. Hartfield: * * * Respectfully I say to you, sir, the relaxing provisions you suggest are impossible. It cannot be done that way. I certify to you it cannot.

* * * * * * *

[fol. 184] Mr. Hartfield: * * * The stock is validly issued, outstanding, unrecallable stock, no matter what happens in your order there. That doesn't concern us.

* * * * * * *

[fol. 185] Mr. Brussel: Your Honor, before court adjourns I may say this in connection with Judge Dimock's suggestion. I am not at all sure that there can't be a practical solution of this problem, and I say here and now [fol. 186] that I will place myself at the disposal of counsel to discuss it and to try to reach some sensible solution.

I am not here to embarrass Alleghany. My only point has been that Alleghany has embarrassed itself.

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[fol. 187] Mr. Brussel: Your Honors, I think that that portion of the supplemental complaint which deals with the issues originally presented should be considered, otherwise your Honors would be without jurisdiction to pass on the other orders.

You must have a pleading before you before you could pass on it.

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[fol. 188] ORAL STIPULATION—July 13, 1955

It is stipulated and agreed between and among the attorneys for the respective parties hereto, including the intervenor Samuel Mehlman, appearing pro se, and Randolph Phillips, pro se, that plaintiffs' motion to serve a supplemental complaint be and the same is hereby granted, to the extent that the original complaint is deemed amended and supplemented to include an allegation presenting for review the order and report of Division 4, dated May 26, 1955, in finance docket No. 18866, and the order of the full Commission dated June 22, 1955, affirming said order and report, and the prayer for relief is deemed amended so as to include a prayer for a preliminary and final injunction against the enforcement of said additional orders, with the same force and effect as if such an allegation and prayer for relief had been included in the original complaint.

Defendants waive the objection to the Court considering the above-mentioned orders, which objection could have been taken on the ground that one or more of said orders were not in existence at the time of the filing of this [fol. 189] complaint.

It is further stipulated that the pending motion for leave

to file a supplemental complaint presented on plaintiffs' motion before the Court this day shall be adjourned to a date to be fixed by the Court after the disposition of the pending motions for a preliminary injunction.

And it is further understood that the pendency of this motion for leave to file a supplemental complaint shall not give to the plaintiff any rights they might not otherwise have in the premises, nor deprive the defendants of any right they might otherwise have.

Nothing in the foregoing stipulation shall be construed as a concession on the part of the defendants, or any of them, that the two orders of the ICC in Finance Docket 18866 affecting the exchange offer are dependent upon the validity or non-validity of the two orders of the ICC in Finance Docket 14692 and 18656, establishing the status of Allegheny as a carrier.

None of the parties waives any right not expressly and specifically waived in this stipulation.

[fol. 190] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED PLAINTIFFS TO FILE SUPPLEMENTAL COMPLAINT, ETC.—July 8, 1955

Upon the annexed affidavit of Randolph Phillips affirmed to July 7, 1955, the original complaint herein filed June 6, 1955 and the proceedings on the motion for a preliminary injunction now before this Court, let the defendants herein show cause at a term of this Court to be held in Room 1505 of the United States Courthouse, Foley Square, on July 13, 1955 at 4:30 P. M. o'clock, why an order should not be made and entered herein (1) permitting the plaintiffs to serve a supplemental complaint herein substantially in the form of the proposed supplemental complaint annexed to said affidavit of Randolph Phillips; (2) granting or deny-

ing, without further proceedings herein, plaintiffs' motion for an interlocutory injunction with respect to the orders of the I. C. C. dated May 26, 1955 and June 22, 1955, in Finance Docket No. 18866, to the same extent that the prior motion for the same relief is granted or denied with respect to the orders of the I. C. C. dated March 2 and May 24, 1955 in Finance Docket Nos. 14692 and 18656, and (3) granting plaintiffs such other and further relief as may be just.

Sufficient reason appearing therefor let service of this [fol. 191] order be made upon each of the attorneys of record for the defendants herein by mailing to each of said attorneys a copy of said order and of the affidavit of Randolph Phillips affirmed to July 7, 1955, on or before the 9th day of July, 1955.

Dated: New York, N. Y., July 8th, 1955.

E. J. Dimock, U. S. D. J.

[fol. 192] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PROPOSED SUPPLEMENTAL COMPLAINT

Plaintiff Breswick & Co., by Rosston, Hort & Brussel, its attorneys, and plaintiff Randolph Phillips, *pro se*, for their supplemental complaint, respectfully allege, upon information and belief, except as to the allegations of paragraphs 1, 3, 5, 6, 8, 10, and 26, which are alleged upon knowledge:

1. This action was commenced by the filing of the complaint herein on June 6, 1955.

2. On or about February 18, 1955, defendant-intervenor Alleghany Corporation (hereinafter "Alleghany") filed with the Interstate Commerce Commission (hereinafter "I. C. C.") an application dated February 16, 1955, under section 20(a) of the Interstate Commerce Act in Finance Docket No. 18866, for authority to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of ap-

plicant's cumulative 5½-percent preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, [fol. 193] and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock.

3. Said application was opposed by the plantiffs herein, as common stockholders of Alleghany. Subsequent to the filing of said application by Alleghany, plaintiff Phillips filed with the I. C. C. a petition, dated March 25, 1955, for leave to intervene and to be heard upon the merits at an evidentiary hearing, and to dismiss or deny Alleghany's application for lack of jurisdiction and other reasons. Under date of April 8, 1955 an amended petition for leave to intervene was filed by plaintiffs Breswick & Co. and Phillips, on the basis of an opinion dated April 6, 1955 issued by this Court (per Walsh, D. J.) in Civil Action 98-371.

4. Division 4 of the I. C. C., by order dated May 26, 1955 (of which a copy is annexed as Exhibit G to the affidavit of David W. Wallace, Secretary of Alleghany, sworn to June 27, 1955, and submitted in opposition to plaintiffs' motion for a preliminary injunction hereinafter referred to) authorized and approved said application and denied plaintiffs' applications to dismiss and deny. By separate order dated April 20, 1955, of which a copy is also annexed to said Wallace's affidavit as page two of Exhibit G, the I. C. C. granted plaintiffs' application for leave to intervene herein, but withheld publication and service of said order upon plaintiffs until issuance of the order of Division 4 dated May 26, 1955. The order of Division 4, dated May 26, 1955, was issued pursuant to a report of Division 4 dated May 26, 1955, of which a copy was also annexed as Exhibit F to said Wallace's affidavit.

5. Thereafter plaintiffs under date of June 1, 1955 ap- [fol. 194] plied to the full Commission for reconsideration of said Report and Order of Division 4, dated May 26, 1955.

6. On June 15, 1955, plaintiffs, by order to show cause returnable on June 23, 1955, applied to this court for a preliminary injunction as prayed for in the complaint. Said order to show cause, by stipulation of the attorneys

for the United States, the I. C. C. and the plaintiffs, orally made on June 21, 1955, was adjourned to June 30, 1955, with the approval of this court (per Dimock, D. J.)

7. The I. C. C., by order dated June 22, 1955, denied plaintiffs' application for reconsideration of said Report and Order of Division 4 dated May 26, 1955, and denied plaintiffs' motion to dismiss or deny, and affirmed without further report or opinion said Report and Order of Division 4. A copy of said order of June 22, 1955 is annexed to said Wallace's affidavit as Exhibit H. Service of said order, and notification of its issuance was made on plaintiffs by mail, dated June 23, 1955, and received on June 25, 1955.

8. The substance of said I. C. C. order of June 22, 1955, did not become known to plaintiffs until 4:30 P. M. on June 23, 1955.

9. On June 23, 1955, with prior knowledge of said order dated June 22, 1955, and without notice to the plaintiffs or to this Court, and while plaintiffs' said motion for a preliminary injunction was before this Court, defendant Alleghany caused approximately 900,000 shares of said Convertible Preferred Stock to be issued and to be distributed to holders of the Series A 5½% Preferred Stock.

[fol. 195] 10. At 5:55 P. M., on June 23, 1955, this Court, upon plaintiffs' application, made an order temporarily restraining Alleghany, its Transfer Agent, officers, directors, servants and employees, and each of them, from issuing, distributing or transferring any of the said 6% Convertible Preferred Stock until the hearing and determination of plaintiffs' said motion for a preliminary injunction. Said restraining order is still in full force and effect.

11. Said Reports and Orders of the I. C. C. and each of them were null and of no effect in that they were made after the I. C. C. had lost jurisdiction over Alleghany, and without according to plaintiffs any evidentiary hearing upon Alleghany's application, and for other reasons hereinafter set forth.

12. Each share of the proposed new 6% Preferred Stock carries a right to convert into or subscribe to 4.7 shares of common stock of Alleghany upon the payment to Alleghany of $3.75 per share of common stock. Thus, for every share of said Series A 5½% Preferred Stock, the holder will

receive the right to convert into or subscribe to 47 shares of common stock upon the payment of $3.75 per share of common stock.

13. During the pendency before the I. C. C. of plaintiffs' petition for reconsideration, a similar right to subscribe to common stock, upon the payment of $3.75 per share of common stock, had a then market value on the American Stock Exchange of $7.00. On June 23, 1955, the date when the I. C. C. publicly announced issuance of its order affirming Division 4's order, said right was quoted at $7.50. Thus the market value alone of the conversion or subscription rights given for each share of Series A 5½% Preferred Stock was $329, at $7.00 per right for 47 shares, or $352.50 [fol. 196] at $7.50 per right. This compares with a maximum legal claim per share of Series A 5½% Preferred Stock, of $237., as of May 1, 1955, or of roundly $238. as of July 1, 1955.

14. The I. C. C., although required by law so to do, made no attempt to determine the present, past or future value of the conversion privilege based on prior and existing and prospective market valuations for the outstanding common stock and option warrants. Nor did it make any attempt to determine whether, as required by law, the Series A 5½% Preferred Stockholders would receive in the proposed exchange more than the equitable equivalent of their claims.

15. On May 31, 1955, the market price of the Series A Preferred Stock in anticipation of effectuation of the plan, was $292. per share, or 23% more than its maximum legal claim. Such facts as these constituted prima facie evidence that the transactions contemplated by the application were improper in law and equity and a violation of Section 20a of the Interstate Commerce Act, but the full Commission failed to consider these facts although requested to do so by plaintiffs.

16. It was the duty of the I. C. C. to determine whether the value of the rights granted under the Plan to the Series A 5½% Preferred Stockholders did not exceed either the intrinsic or current value of said 5½% stock. The I. C. C. failed to discharge this duty.

17. The I. C. C. found that conversion of the 6% Pre-

ferred Stock would dilute the rights of the common stock, but that compensating advantages were such as not to make the proposal unfair. It described these advantages as an "increase" in the net asset value of the common stock resulting as an immediate effect of the exchange [fol. 197] of the Series A 5½% Stock for the 6% Preferred Stock. Said increase however, is illusory and a mere bookkeeping change, since it results only from translating the dividend arrearages on the Series A stock into the more valuable conversion rights above-mentioned. Since the common stock has no right to withdraw its pro rata share of the assets, it is unable to realize the "increase" in net asset value. Thus there was no substantial evidence to support the I. C. C.'s finding that the potential dilution of the common stock equity was offset by compensating advantages, nor was this finding made in accordance with legal standards.

18. As a result of the I. C. C.'s findings and approval of the Plan, the common stockholders are being forced to donate to the Series A 5½% Preferred Stockholders rights with a current value of more than 15 million dollars in excess of the maximum legal claim of these preferred stockholders.

19. Young, Chairman of Alleghany, his wife, and Kirby, President, own 20% of the total Series A Preferred Stock outstanding, and thus stand to realize no less than 3 million dollars, at current prices, of this unlawful profit.

20. The common stockholders were not protected by "arms-length bargaining" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the Plan, and the terms of the Plan were imposed by Young whose total investment in the common stock is roundly less than $500,000, at current market prices, compared with more than $4,500,000. for his and his wife's Series A preferred stockholdings, based on a value of $300. per share. [fol. 198] 21. The I. C. C. found that "a sufficient answer" to this contention was the fact that holders of 70% of the common stock voted to approve the Plan. Such a finding is improper and not pursuant to legal standards.

22. The acts of the I. C. C. herein complained of and its Report and Orders of May 26, 1955 and June 22, 1955, in

Finance Docket No. 18866 approving said application of Alleghany, are arbitrary and capricious; are not in accordance with legal standards; are unsupported by substantial evidence; are in violation of Sections 5(2), 5(3) and 20a of the Interstate Commerce Act. Said proceedings and orders were also made in violation of Sections 5, 7 and 8 of the Administrative Procedure Act in that they deny to plaintiffs a fair and impartial hearing upon the merits of said application; and deprive plaintiffs of their property without due process of law.

23. By reason thereof the I. C. C. has illegally and unlawfully authorized the issuance of said 6% Convertible Preferred Stock and of the aforesaid additional common stock to the detriment and damage of the plaintiffs and all other common stockholders of Alleghany.

24. Said acts are also in violation of the rights, benefits, privileges and protections accorded to the common stockholders of Alleghany under the Investment Company Act.

25. Said acts, if continued and not annulled, will result in continuous and irreparable damage and prejudice to plaintiffs and all other common stockholders. The loss of said rights, benefits and protections can in large part never be recovered and certain of them are not compensable in damages.

[fol. 199] 26. Plaintiffs have no adequate remedy at law.

27. Unless this court issue an interlocutory and permanent injunction restraining the enforcement, operation and execution of said I. C. C. orders dated May 26, and June 22, 1955, and restraining defendant Alleghany from taking any steps to issue, distribute and transfer said securities, plaintiffs and all other common stockholders of Alleghany will continue to suffer further irreparable damage not compensable at law.

Wherefore, plaintiffs pray:

(a) That this court, heretofore constituted and convened as provided by Title 28 U. S. C. 2284, assume jurisdiction over the matters and things alleged in this supplemental complaint;

(b) That a temporary or interlocutory injunction be entered herein vacating and declaring null the orders of

the I. C. C. dated May 26, 1955 and June 22, 1955, in Finance Docket No. 18866;

(c) That a permanent injunction be entered herein requiring the defendant I. C. C. to set aside, nullify and void in their entirety its orders of May 26, 1955 and June 22, 1955, in Finance Docket No. 18866, and restraining defendant Alleghany, its directors, officers, transfer agent, servants, employees and all other persons claiming under it from issuing, distributing, transferring, or further dealing [fol. 200] or trading in any shares of said 6% Convertible Preferred Stock;

(d) That this court grant to plaintiffs such other and further relief as may be just and equitable.

Rosston, Hort & Brussel, By George Brussel, Jr., a partner, Attorneys for plaintiff Breswick & Co., Office and Post Office Address, 141 Broadway, New York 6, New York; Randolph Phillips, *pro se*, Office and Post Office Address, 53 East 74th Street, New York 21, New York.

[fol. 201] State of New York,
County of New York, ss.:

Randolph Phillips, being duly affirmed, deposes and says: that he is one of the plaintiffs in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Randolph Phillips.

Affirmed to before me this 7th day of July, 1955.

Eugene G. King, Notary Public, State of New York, No. 03-7267750, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1956.

[fols. 202-204] Affidavit of Service (omitted in printing)

[fol. 205] [MEMO ENDORSED]—Granted by stipulation entered into in open Court, 7/13/55, C. C. Hincks, C. J., E. J. Dimock, D. J., Lawrence E. Walsh, D. J.

[fol. 206] IN UNITED STATES DISTRICT COURT

July 11, 1955.
RFD #1, Box 118,
Valleybrook Road,
Dover, N. J.

Mr. Young,
Alleghany Corporation,
Chrysler Building,
New York, N. Y.

Dear Mr. Young:

Recently I tendered 40 shares of the old Alleghany Preferred stock, for which I was to receive 400 shares of the new preferred.

Recently, when I heard that the new preferred was to be released by the bank, I took a personal bank loan for home repairs, which was to be converted to a collateral loan within a week when I received the stock.

Since this stock has been held up, I am somewhat in an embarrassing situation and have been compelled to extend my personal loan.

I realize that this is no fault of your corporation, but if there is anything you can do to expedite delivery of these shares at the earliest possible moment, it will be most appreciated.

I have been an ardent rooter of yours for years and think it is wonderful as to the results you have obtained not only for Alleghany but also for New York Central.

With kindest regards, I remain,

Yours very truly, Theo. Zander, RFD #1, Box 118, Valleybrook Road, Dover, N. J.

[fol. 207] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF SETTLEMENT OF INTERLOCUTORY INJUNCTION—July 22, 1955

SIRS:

Please take notice that an order, of which the within is a copy, will be presented for signature to the Honorable Carroll C. Hincks, Judge of the United States Court of Appeals for the Second Circuit, the Honorable Edward J. Dimock, Judge of the United States District Court for the Southern District of New York, and the Honorable Lawrence E. Walsh, Judge of the United States District Court for the Southern District of New York, on the 26th day of July, 1955, at 4:30 o'clock in the afternoon, at the office of the Clerk of the United States District Court for the Southern District of New York, Room 601, United States Court House, Foley Square, New York, New York.

Dated: July 22, 1955.

White & Case, Attorneys for defendant, Alleghany Corporation, 14 Wall Street, New York 5, New York.

To:

Rosston, Hort & Brussel, Esqs., Attorneys for plaintiff, Breswick & Co., 141 Broadway, New York 6, New York.

[fol. 208] To:

Randolph Phillips, *pro se*, c/o Rosston, Hort & Brussel, Esqs., 141 Broadway, New York 6, New York.

Honorable Herbert Brownell, Jr., Attorney-General of the United States, Attorney for defendant, United States of America, Department of Justice, Washington 25, D. C.

Leo H. Pou, Esq., Attorney for defendant, Interstate Commerce Commission, Washington 25, D. C.

Harold H. McLean, Esq., Attorney for defendant, The

New York Central Railroad Company, 466 Lexington Avenue, New York 17, New York.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for defendants, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., 11 Broadway, New York 4, New York.

Cahill, Gordon, Reindel & Ohl, Esqs., As *amicus curiae* on behalf of Reynolds & Co., G. H. Walker & Co., Ernst & Co., Eisele & King, Libaire, Stout & Co., Abraham & Co., Goldman Sachs & Co., Bear Stearns & Co. and Peter Lavan, 63 Wall Street, New York 5, New York.

Samuel A. Mehlman, Esq., *pro se*, 165 Broadway, New York 6, New York.

[fol. 209] In United States District Court
Southern District of New York

Breswick & Co. and Randolph Phillips, as common stockholders of Alleghany Corporation, Plaintiffs,

against

United States of America, The Interstate Commerce Commission, Alleghany Corporation, The New York Central Railroad Company; Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., and Samuel A. Mehlman, Defendants.

Order on Interlocutory Injunction—July 26, 1955

This Court having made an order dated June 15, 1955, convening a three-judge court pursuant to Title 28 U. S. C., Section 2284, and plaintiffs having by order to show cause dated June 15, 1955, moved this Court for an interlocutory injunction vacating or restraining the enforcement, operation and execution of orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, in Finance Dockets of the Interstate Commerce Commission Nos. 14692 and 18656, in so far as said orders approved and authorized the application of Alleghany Corporation

before the Interstate Commission dated September 17, 1954, and plaintiffs' said motion for interlocutory injunction having duly come on to be heard before Honorable Carroll C. Hincks, Judge of the United States Court of Appeals for the Second Circuit; Honorable Edward J. Dimock, Judge of the United States District Court for the Southern District of New York, and Honorable Lawrence E. Walsh, Judge of the United States District Court for the Southern District of New York, on the 28th day [fol. 210] of June, 1955, and Alleghany Corporation, The New York Central Railroad Company, and Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur H. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., having prior to the aforesaid hearing of June 28, 1955, moved this Court by orders to show cause for leave to intervene and for leave to serve answers, and in the case of the aforesaid partnership for other relief, and said motions having been granted in open court on June 28, 1955, in so far as said motions sought leave to intervene and to be permitted to serve answers; and the Court, per Dimock, J., having made an order dated June 23, 1955, restraining and enjoining Alleghany Corporation, its transfer agents, officers, directors, servants and employees, and each of them, from issuing, distributing or transferring any of the 6% Convertible Preferred Stock of Alleghany Corporation, which is the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting so to do until the hearing and determination by this Court of plaintiffs' motion for preliminary injunction annulling the order of the Interstate Commerce Commission dated May 24, 1955 in Finance Docket No. 18656; and plaintiffs having moved this court by order to show cause dated July 8, 1955, for an order permitting plaintiffs to serve a supplemental complaint and granting or denying, without further proceedings, plaintiffs' motion for an interlocutory injunction with respect to orders of the Interstate Commerce Commission dated May 26, 1955 and June 22, 1955, in Finance Docket No. 18866, to the same extent that plaintiffs' motion for the same relief is granted or denied with respect to the orders of the Interstate Commerce Commission dated [fol. 211] March 2, 1955 and May 24, 1955, in Finance

Dockets Nos. 14692 and 18656; and Samuel A. Mehlman having by order to show cause dated July 12, 1955, moved for leave to intervene and to serve an answer, and said motion of plaintiffs brought on by said order to show cause dated July 8, 1955, and said motion of Samuel A. Mehlman having both come on to be heard on July 13, 1955, and the motion of Samuel A. Mehlman having been granted in open court on July 13, 1955; and the parties having entered into a stipulation with respect to plaintiffs' motion seeking leave to amend their complaint in open court on July 13, 1955; and upon the orders of this Court above mentioned, dated June 15, 1955 and June 23, 1955, and upon the aforesaid order to show cause dated July 8, 1955; and upon reading and filing the summons and complaint, the stipulation entered into in open court made July 13, 1955, the orders of this Court dated June 30, 1955 and July 15, 1955, granting leave to various parties to intervene and serve answers; and upon the affidavits of Randolph Phillips affirmed to June 15, 1955, June 28, 1955, June 29, 1955, and July 7, 1955, and the affidavits of George Brussel, Jr. sworn to June 23, 1955 and July 13, 1955, all the same above mentioned affidavits in support of the motions of plaintiffs and in support of the aforesaid restraining order dated June 23, 1955; and upon the affidavits of David W. Wallace sworn to June 27, 1955 and July 13, 1955, the affidavits of Harold H. McLean sworn to the 24th and 27th days of June, 1955, and the affidavits of Charles H. Blatt sworn to June 27, 1955 and July 13, 1955, and the affidavit of Samuel A. Mehlman sworn to July 11, 1955, all in opposition to [fol. 212] plaintiffs' applications for preliminary injunctions and in opposition to the continuance of the aforesaid order dated June 23, 1955; and plaintiffs having on June 24, 1955, pursuant to the direction of this Court, filed an undertaking in the sum of $1,000, and upon the answers of Alleghany Corporation; The New York Central Railroad Company; Samuel A. Mehlman; the aforesaid partnership, Gruss & Co.; and after hearing Rosston, Hort & Brussel (George Brussel, Jr., of counsel), attorneys for plaintiff, Breswick & Co., and Randolph Phillips, *pro se*, in support of plaintiffs' motion for an interlocutory injunction and in support of plaintiffs' application for a temporary restraining order and the continuance thereof,

and after hearing White & Case and Wheeler & Wheeler (David Hartfield, Jr. and Edward K. Wheeler, of counsel), attorneys for defendant, Alleghany Corporation; Leo H. Pou, attorney for defendant, Interstate Commerce Commission; Herbert Brownell, Jr., Attorney-General of the United States of America (James H. Durkin, of counsel), attorney for defendant, United States of America; Harold McLean and Wheeler & Wheeler (Edward K. Wheeler and Arthur H. Bernstein, of counsel), attorneys for defendant, The New York Central Railroad Company; Proskauer, Rose, Goetz & Mendelsohn (Harold H. Levin, of counsel), attorneys for the aforesaid individuals doing business as Gruss & Co.; Samuel A. Mehlman, Esq., *pro se*, and Cahill, Gordon, Reindel & Ohl (Paul W. Williams, of counsel), as *amicus curiae* on behalf of Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder, Peabody & Co., E. F. Hutton & Co., Eisele & King, Libaire, Stout & Co., Abraham & Co., Goldman, Sachs & Co., Bear Stearns & Co. and Peter Lavan, all in opposition to plaintiffs' motion for temporary injunction and in opposition to the continuance of [fol. 213] the restraining order of this Court dated June 23, 1955, and upon all the proceedings hitherto had herein, and due deliberation having been had, and the Court having rendered its opinion containing findings of fact and conclusions of law, with Hincks, C. J., dissenting, it is

Ordered, that defendants, Interstate Commerce Commission and Alleghany Corporation, be and they hereby are restrained, pending final judgment in this cause, from enforcing or taking any action pursuant to (a) the orders of the Interstate Commerce Commission made March 2, 1955 and May 24, 1955, in Finance Dockets 14692 and 18656, in so far as they determine that Alleghany Corporation is in control of the New York Central Railroad and in so far as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10) inclusive and Section 20a (2) to (11) inclusive of the Interstate Commerce Act, or (b) the orders of the Interstate Commerce Commission made May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock; and it is further

Ordered, that Alleghany Corporation, its transfer

agents, officers, directors, servants and employees, and each of them, be and they hereby are enjoined from issuing, distributing or transferring or converting into common stock any of the 6% Convertible Preferred Stock of Alleghany Corporation, which was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause; and it is further

Ordered, that the caption of this case be and it hereby is amended so as to read as follows:

[fol. 214] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation, Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., and SAMUEL A. MEHLMAN, Defendants.

and it is further

Ordered, that plaintiffs furnish, within three days after the entry of this order, a bond in the sum of $1,000. as security for the payment of such costs and damages as may be incurred or suffered by Alleghany Corporation if it be found to have been wrongfully enjoined by this order.

The reasons for the issuance of this preliminary injunction are:

1. This case presents only issues of law which are serious and are resolved in favor of the plaintiffs.

2. That unless the enforcement of the orders complained of be enjoined pending final hearing plaintiffs will suffer irreparable damage in that:

A. As found by this court plaintiffs have the right to invoke the protections of the Investment Company Act

against jurisdiction of the Interstate Commerce Commission unlawfully asserted and have no adequate remedy at law to vindicate that right.

B. The unlawful acts of the Interstate Commerce Commission have deprived plaintiffs of the preferences, privileges and protection of the Investment Company Act and the Interstate Commerce Act against manipulation of [fols. 215-218] those in control of Alleghany Corporation, including the possibility of dilution of the equity of the common stockholders by conversion of the new preferred stock for which they would be remediless in spite of the adjudged illegality of the preferred stock.

C. Unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers so that an unscrambling, in the event of a determination that the Interstate Commerce Commission approval was unlawful, would be a practical impossibility.

D. The Investment Company Act was enacted to protect the national public interest and the interest of investors, one of the purposes being to protect investors in investment companies against the managing of those companies in the interests of persons other than the investors, and the preliminary injunction is necessary to preserve for the plaintiffs the benefits and protection of the Investment Company Act, pending final hearing.

E. The denial of a preliminary injunction would deprive plaintiffs of findings required by Section 5(2) of the Interstate Commerce Act, that the orders reviewed are consistent with the public interest and otherwise comply with the provision of said Section 5(2) and 5(3).

Dated: New York, N. Y. July 26, 1955.

E. J. Dimock, U. S. D. J.

* * * * * * *

[fols. 219-220] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER DENYING SUSPENSION OF INJUNCTION PENDING APPEAL —July 26, 1955

Defendant Alleghany Corporation having moved for a suspension of the injunction pending appeal on a show cause order which issued on July 21, 1955 returnable on July 26, 1955, the court comprised of Judges Hincks and Dimock convened on the return day, and proceeded to hear the motion in the absence of Judge Walsh whose participation could have been obtained only on a substantial continuance of the matter. The undersigned two Judges having heard said motion and having been unable to agree upon the determination thereof for the reasons stated in the memoranda filed by them herewith, it is hereby

Ordered that said motion be and the same hereby is denied.

Dated: July 26, 1955.

Carroll C. Hincks, C. J., E. J. Dimock.

[fol. 221] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM 1955

BRESWICK & CO. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., and SAMUEL A. MEHLMAN, Defendants.

ORDER OF MR. JUSTICE HARLAN PARTIALLY GRANTING STAY—August 9, 1955

An application having been made before me by defendant, Alleghany Corporation, for an order (a) staying, pending appeal to this Court under 28 U. S. C. Sec. 1253, a preliminary injunction order of a three-judge court of the United States District Court for the Southern District of New York made on July 26, 1955, (b) granting supersedeas upon Alleghany posting an appropriate and sufficient bond, and (c) setting the appeal for argument on the first day of this Court in October, and said application having come on to be heard before me on August 1, 1955, at the United States Court House, Foley Square, New York, New York, and upon reading and filing the notice of the application and supporting affidavit of David Hartfield, Jr., sworn to July 25, 1955, and the affidavit of Harold H. Levin, sworn to July 28, 1955, in support of said application, and the affidavits of Randolph Phillips, affirmed to the 1st day of August, 1955, and George Brussel, Jr., sworn to the 1st day of August, 1955, in opposition to said application; and after hearing David Hartfield, Jr. and Edward K. Wheeler, attorneys for defendant, Alleghany Corporation, and Harold H. Levin, attorney for defendants, Joseph S. Gruss, Charles [fol. 222] H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., and Edward K. Wheeler, attorney for defendant, The New York Central Railroad Company, and

Samuel A. Mehlman, defendant *pro se*, and John T. Cahill, as *amicus curiae* for Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder, Peabody & Co., E. F. Hutton & Co., Eisele & King, Libaire, Stout & Co., Abraham & Co., Goldman Sachs & Co., Bear Stearns & Co. and Peter Lavan, all in support of said application, and George Brussel, Jr., attorney for plaintiff, Breswick & Co., and Randolph Phillips, plaintiff *pro se*, in opposition to said application, and after hearing William H. Timbers, *amicus curiae* on behalf of the Securities and Exchange Commission, and after hearing statements in open court read on behalf of the United States of America and the Interstate Commerce Commission; and having filed a memorandum opinion, dated August 3, 1955, with respect to such application, and Alleghany Corporation having filed its notice of appeal to this Court from the order below, now it is

Ordered, that upon defendant, Alleghany Corporation, filing simultaneously with the entry of this order a surety bond running to plaintiffs in the amount of $14,000, containing the usual conditions, and in addition indemnifying the plaintiffs against all loss and damage arising out of (1) dilution of the value of their common stock by reason of the conversion of any of the new preferred stock and (2) the absence of Investment Company Act protection, pending final determination of the issues involved in this litigation, the order below made July 26, 1955 and entered July 27, 1955, be and the same hereby is stayed pending appeal to this Court in so far as said order below enjoins Alleghany Corporation, its transfer agents, officers, directors, servants and employees, and each of them, from issuing, distributing or transferring or converting into common stock any of the 876,800 shares of 6% convertible pre-[fol. 223] ferred stock of Alleghany Corporation delivered by Marine Midland Trust Company of New York, Exchange Agent, prior to notice of the restraining order made, per Dimock, J., on June 23, 1955, below, which said stock was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause; and it is further

Ordered, that such part of the order below as enjoins

and restrains defendant, Alleghany Corporation, pending final judgment in this cause, from taking any action pursuant to the orders of the Interstate Commerce Commission made May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% convertible preferred stock, be and the same hereby is stayed to the extent set forth in the first ordering paragraph of this order pending appeal to this Court; and it is further

Ordered, that said application be and the same hereby is in all other respects denied.

Dated: August 9, 1955.

(Sgd.) John M. Harlan, Justice of the United States Supreme Court.

[fol. 224] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil 101-114

BRESWICK & CO., ET ANO., as common stockholders of Alleghany Corporation, Plaintiffs,

against

UNITTED STATES OF AMERICA, ET AL., Defendants.

NOTICE OF MOTION FOR LEAVE TO FURTHER AMEND THEIR ORIGINAL AND SUPPLEMENTAL COMPLAINT—Filed February 29, 1956

Please take notice, that upon the annexed affidavit of George Brussel, Jr., sworn to August 29, 1955, the undersigned will move this court at the United States Courthouse, Room 1705, Foley Square, New York City, on the 6th day of September, 1955, at 10:45 A. M. for an order pursuant to Rule 15 of the Federal Rules of Civil Procedure:

1. Further amending the original and supplemental complaints herein (as amended by the stipulation entered into

in open court on July 13, 1955), by adding to paragraph 4 of the original complaint a new sentence reading as follows:

"Plaintiffs institute this action on behalf of themselves and all other common stockholders of Alleghany Corporation, similarly situated."

2. Amending the summons and title of this action to read as follows:

[fol. 225] "UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation individually and on behalf of all other common stockholders of Alleghany Corporation similarly situated, Plaintiffs,

against

UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; ALLEGHANY CORPORATION; THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing busines as Gruss & Co.; SAMUEL A. MEHLMAN; and SALWYN SHUFRO, Defendants."

Dated: New York, N. Y., August 29, 1955.

Yours, etc., Rosston, Hort & Brussel, Attorneys for Plaintiff, Breswick & Co., 141 Broadway, New York 6, N. Y.; Randolph Phillips, Defendant, *Pro Se*, 53 East 74th Street, New York 21, N. Y.

To:

Stanley N. Barnes, Esq., Assistant Attorney General, Washington, D. C.

Hon. Lloyd F. MacMahon, United States Attorney, for the Southern District of New York, United States Courthouse, Foley Square, New York, N. Y., Attorneys for defendant, United States of America.

[fol. 226] Samuel R. Howell, Esq., c/o Interstate Commerce Commission, Washington, D. C., Attorney for Interstate Commerce Commission.

White & Case, Esqs., 14 Wall Street, New York 5, New York, Attorneys for defendant, Alleghany Corporation.

Harold H. McLean, Esq., Edward K. Wheeler, Esq., Attorneys for defendant, The New York Central Railroad Company, 466 Lexington Avenue, New York 17, New York.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for defendant, Gruss & Co., 11 Broadway, New York 4, New York.

Samuel A. Mehlman, Esq., Defendant, pro se, 165 Broadway, New York, New York.

Krause, Hirsch, Levin & Heilpern, Esqs., Attorneys for defendant, Salwyn Shufro, 521 Fifth Avenue, New York 17, N. Y.

[fol. 227] AFFIDAVIT OF GEORGE BRUSSEL, JR.

STATE OF NEW YORK,
County of New York, ss.:

George Brussel, Jr., being duly sworn, deposes and says:

I am a member of the firm of Rosston, Hort & Brussel, the attorneys for the plaintiffs herein, and I make and submit this affidavit in support of the relief requested in the annexed notice of motion.

1. Although this action was instituted, in form only, as an action on behalf of two common stockholders of defendant Alleghany, it is, in substance and effect a representative action on behalf of the common stockholders as a class to whom, as a class, inures the benefits of the rights and remedies heretofore created and which may hereinafter be created on final hearing herein.

2. A direct consequence of a determination favorable to the plaintiffs herein will be to annul the I. C. C. order authorizing the issuance of the new 6% preferred stock which defendant Alleghany admits and this court found will dilute the equity of the common stock-
[fol. 228] holders.

3. The new preferred carries with it the right to convert into common stock of Alleghany upon the basis of

47 shares of common for each share of new 6% preferred upon the payment in cash of $3.75 per common share, a right which sold on the American Stock Exchange as late as June 27, 1955 for $7.375.

4. This right of conversion is obviously at the expense of the Alleghany common stockholders, for the common stock of Alleghany to be issued on exercise of the conversion right comes out of a new authorized issue of 14,768,352 shares of common stock of Alleghany.

5. It is not necessary to estimate now the monetary and other benefits that will inure to the common stock as a result of an invalidation of the issue of new 6% preferred stock, but it is desirable, so far as possible, to permit these benefits to be taken advantage of by the entire class as a result of any final adjudication that may come down in this case. On the other hand, if defendant Alleghany can succesfully claim, as it already has, that the adjudication here binds and benefits only the plaintiffs as individual stockholders, then the entire class will be prejudiced by a denial of this application to sue on behalf of the class.

6. If plaintiffs do not prevail, the benefit to Alleghany from a class adjudication is obvious.

7. It is therefore in the interest of both plaintiffs and Alleghany that this application be granted. No prejudice can result to any of the other parties to this action.

[fols. 229-230] 8. I am informed that since June 24, 1955, the date of suspension from trading on the New York Stock Exchange of the new 6% preferred stock following the issuance of the temporary restraining order herein, none of said shares has been traded on the New York Stock Exchange or through over the counter members of the National Association of Security Dealers; that counsel for the New York Stock Exchange has advised that trading therein should continue to be suspended until the Supreme Court of the United States has reviewed the order granting a preliminary injunction; that the National Association of Security Dealers is governing its action by the action taken by the New York Stock Exchange and that, by reason thereof, there has been practically no trading in the new securities since June 24, 1955. There has, however, been a limited amount of trading "over-the-counter" on a "when-

issued'' basis. These trades will be automatically cancelled if the orders of the I. C. C. are set aside and voided. The New York Stock Exchange which permitted ''when-issued'' trading prior to June 24, 1955, has not permitted it since then. The source of my information is a telephone conversation between plaintiff Phillips and Philip West, Vice President of the New York Stock Exchange.

George Brussel, Jr.

* * * * * * *

Duly sworn to by George Brussel, Jr. Jurat omitted in printing.

[fol. 231] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AMENDED ANSWER OF INTERVENOR DEFENDANT, ALLEGHENY CORPORATION—Filed September 6, 1955

Intervenor-defendant, Alleghany Corporation, for answer, by White & Case, its attorneys:

A. *To plaintiffs' original complaint*

1. Denies each allegation contained in paragraphs 1, 7, 8, 10, 19, 24, 25, 26, 27, 28, 29 and 30 of plaintiffs' original complaint.

2. Denies knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of plaintiffs' original complaint to the effect that plaintiffs are the beneficial owners of 700 shares of common stock of Alleghany Corporation (hereinafter ''Alleghany''); that plaintiff, Phillips, is the Chairman of a Protective Committee for Common Stockholders of Alleghany Corporation, of which he, one Myron J. Neisloss and one Edward C. Sterling are members, the committee being, collectively, the beneficial owners of 1,700 shares of common stock and the holders of

proxies from other owners of common stock of Alleghany; denies there is any interest of the committee in the matters [fol. 232] herein complained of, as set forth in Exhibit A annexed to plaintiffs' original complaint and as is alleged in said paragraph 3 of plaintiffs' original complaint.

3. Denies knowledge or information sufficient to form a belief as to each allegation in paragraph 2 of plaintiffs' original complaint.

4. Admits the purpose of said application was to obtain the I. C. C.'s approval and authorization of a proposed merger of the properties and franchises of Louisville & Jeffersonville Bridge and Railroad Company into the Big Four for the purposes of ownership, management and operation and "continued control" of said properties by The New York Central Railroad Company and Alleghany; but except as herein expressly admitted, denies each allegation contained in paragraph 6 of plaintiffs' original complaint.

5. Admits that by report and order dated March 2, 1955, Division 4 approved the application of Alleghany, and overruled the objections of plaintiffs thereto; copies of said report and order are annexed to plaintiffs' original complaint as Exhibits "B-3" and "B-4", respectively; but except as herein expressly admitted, denies each allegation contained in paragraph 11 of plaintiffs' original complaint.

6. Admits by report and order dated May 24, 1955, the I. C. C. overruled all of plaintiffs' objections to said application and affirmed the March 2, 1955 order of Division 4 approving and authorizing said application; but except as herein expressly admitted, denies each allegation in paragraph 13 of plaintiffs' original complaint.

7. Admits upon petition and supplementary petition of the S. E. C., the I. C. C. permitted the S. E. C. to intervene in the proceeding before the I. C. C. for the limited pur- [fol. 233] poses of filing a memorandum dated September 14, 1954, and a supplement thereto; but except as herein expressly admitted, denies each allegation contained in paragraph 14 of plaintiffs' original complaint.

8. Denies the S. E. C. and plaintiffs both contended unsuccessfully before the I. C. C. in said proceeding that it was the latter's duty and obligation under the Interstate Commerce Act to dismiss or deny the application of Alleghany;

and except as herein denied, admits the allegations of paragraph 15 of plaintiffs' original complaint.

9. Denies Alleghany has outstanding two million perpetual warrants to purchase common stock at $3.75 per share; but except as herein expressly denied, admits the allegations of paragraph 16 of plaintiffs' original complaint.

B. *To plaintiffs' proposed amended and supplemental complaint.*

10. Admits that subsequent to the filing of the said application by Alleghany, plaintiff Phillips filed with the I. C. C. a petition, and as to that petition intervenor-defendant, Alleghany, respectfully begs leave to refer to same; that under date of April 8, 1955 a petition was filed by plaintiffs, Breswick & Co. and Phillips, and intervenor-defendant, Alleghany, respectfully begs leave to refer to same; that said application was opposed by the plaintiffs herein; but except as herein expressly admitted, denies each allegation contained in paragraph 3 of plaintiffs' amended and supplemental complaint.

[fol. 234] 11. Admits Division 4 of the I. C. C., by order dated May 26, 1955 (of which a copy was annexed as Exhibit G to the affidavit of David W. Wallace, Secretary of Alleghany, sworn to June 27, 1955, and submitted in opposition to plaintiffs' motion for a preliminary injunction hereinafter referred to) authorized and approved said application; that by separate order dated April 20, 1955, of which a copy was also annexed to said Wallace's affidavit as page 2 of Exhibit G, the I. C. C. granted plaintiffs' application for leave to intervene; that the order of Division 4 dated May 26, 1955, was issued pursuant to a report of Division 4 dated May 26, 1955, of which a copy was also annexed as Exhibit F to said Wallace's affidavit; but except as herein expressly admitted, denies knowledge or information sufficient to form a belief as to each allegation contained in paragraph 4 of plaintiffs' amended and supplemental complaint.

12. Denies knowledge or information sufficient to form a belief as to each allegation contained in paragraphs 6 and 8 of plaintiffs' amended and supplemental complaint.

13. Denies each allegation contained in paragraphs 9,

11, 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 27 of plaintiffs' amended and supplemental complaint.

14. Admits the I. C. C., by order dated June 22, 1955, denied plaintiffs' application for reconsideration of said report and order of Division 4 dated May 26, 1955, and as to the effect of said order respectfully begs leave to refer to same; that a copy of said order of June 22, 1955 is annexed to said Wallace's affidavit as Exhibit H; but except [fol. 235] as herein in this paragraph of this answer expressly admitted or otherwise treated, denies knowledge or information sufficient to form a belief as to each allegation contained in paragraph 7 of plaintiffs' amended and supplemental complaint.

15. Denies said restraining order is still in full force and effect; but admits each allegation contained in paragraph 10 of plaintiffs' amended and supplemental complaint except as herein expressly denied.

16. Denies that each share of the proposed new 6% preferred stock carries a right to subscribe to 4.7 shares of common stock of Alleghany upon the payment to Alleghany of $3.75 per share of common stock; that for every share of said Series A 5½% preferred stock, the holder will receive the right to convert into or subscribe to 4⅞ shares of common stock upon the payment of $3.75 per share of common stock; but except as herein expressly denied, admits each allegation contained in paragraph 12 of plaintiffs' amended and supplemental complaint.

17. Admits the I. C. C. found that conversion of the 6% preferred stock might dilute the rights of the common stock, but the compensating advantages were such as not to make the proposal unfair and that it described as an advantage of the exchange offer an "increase" in the net asset value of the common stock, resulting as an immediate effect of the exchange of the Series A 5½% stock for the 6% stock; but except as herein expressly admitted, denies each allegation contained in paragraph 17 of plaintiffs' amended and supplemental complaint.

18. Admits the I. C. C. found that "a sufficient answer" to one of plaintiffs' contentions was that the fact that the [fol. 236] holders of over 70% of the common stock voted to approve the plan; but except as herein expressly ad-

mitted, denies each allegation contained in paragraph 21 of plaintiffs' amended and supplemental complaint.

For an affirmative defense to both causes of action, and as to each of them:

19. Each cause of action pleaded by plaintiffs fails to state a claim upon which relief can be granted.

For a second affirmative defense to both causes of action, and as to each of them:

20. Plaintiffs have no standing to sue with regard to one or any or all of the orders of I. C. C. made in Finance Docket No. 18866 and in Finance Docket Nos. 14692 and 18656.

For a third affirmative defense to both causes of action, and as to each of them:

21. Plaintiffs have not the capacity to review one or any or all of the orders of I. C. C. made in Finance Docket No. 18866 and in Finance Docket Nos. 14692 and 18656.

For a fourth affirmative defense to both causes of action, and as to each of them:

22. Plaintiffs have an adequate remedy at law.

For a fifth affirmative defense to both causes of action, and as to each of them:

23. Plaintiffs have an adequate remedy in equity before a plenary single-judge court to accomplish the results they seek here to achieve. Plaintiffs sue in the wrong forum. [fol. 237-238] Wherefore, defendant, Alleghany Corporation, demands dismissal of plaintiffs' original complaint and plaintiffs' amended and supplemental complaint, together with the costs and disbursements of this action.

Dated: September 1, 1955.

White & Case, By David Hartfield, A Member of the Firm, Attorneys for intervenor-defendant, Alleghany Corporation, 14 Wall Street, New York 5, New York.

[fol. 239] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA TO PROPOSED SUPPLEMENTAL COMPLAINT—Filed September 1, 1955

On the assumption that the plaintiffs will be permitted by the Court to file herein their proposed Supplemental Complaint, a copy of which was attached to the order to show cause herein issued by Judge Dimock on July 8, 1955, now comes the United States of America, a defendant, and in answer to the Complaint says:

I

Answering the allegations contained in Paragraphs 1 through 7, the United States admits the same. However, with respect to the allegation in Paragraph 4 that the Commission "withheld publication and service of said order upon plaintiffs until issuance of the order of Division 4 dated May 26, 1955," the United States denies any inference which may be drawn from the said allegation to the effect that the Interstate Commerce Commission deliberately and intentionally withheld from the plaintiffs information as to the order permitting their intervention.

[fol. 240]

II

Answering the allegations contained in Paragraphs 8 and 9, the United States neither admits nor denies the same for lack of knowledge.

III

Answering the allegations contained in Paragraph 10, the United States admits the same.

IV

Answering the allegations contained in Paragraph 11, the United States denies the same.

V

Answering the allegations contained in Paragraphs 12 and 13, the United States neither admits nor denies the same for lack of knowledge.

VI

Answering the allegations contained in Paragraph 14, the United States denies the same.

VII

Answering the allegations contained in Paragraph 15, the United States denies the same, except those contained in the first sentence, which it neither admits nor denies for lack of knowledge.

VIII

Answering the allegations contained in Paragraph 16, the United States denies the same.

IX

Answering the allegations contained in Paragraph 17, the United States denies the same, except for those contained in the first two sentences, which it admits, but concerning which it respectfully refers the Court to the report itself for a complete statement of the Commission's findings and determination.

[fol. 241] X

Answering the allegations contained in Paragraph 18, the United States denies the same.

XI

Answering the allegations contained in Paragraphs 19 and 20, the United States neither admits nor denies the same for lack of knowledge.

XII

Answering the allegations contained in Paragraph 21, the United States denies the same, except for the allegation in the first sentence, which it admits.

XIII

Answering the allegations contained in Paragraphs 22 through 27, the United States denies the same.

XIV

Further answering the allegations of the Supplemental Complaint, the United States alleges that the findings and conclusions set forth in the Interstate Commerce Commission's report of May 26, 1955, upon which the orders assailed by the plaintiffs are based, are fully supported by the evidence; that, in making its said report and orders, the Commission carefully considered the National Transportation Policy and considered and weighed carefully, in the light of its own knowledge and experience, each fact and circumstance brought to its attention by or on behalf of the parties to the proceedings; that in making said report and orders the Commission did not act arbitrarily or exceed its authority; that said report and orders of the Commission are lawful and valid in all respects; and except as hereinabove expressly admitted, the United States denies each and every allegation contained in the Supplemental Complaint.

[fols. 242-243] Wherefore, having fully answered, the United States prays that the relief sought in the Supplemental Complaint be denied and that the Supplemental Complaint be dismissed, plaintiffs to pay the costs.

Albert Parker, John H. D. Wigger, James H. Durkin, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Attorneys for the United States of America.

Stanley N. Barnes, Assistant Attorney General.
Lloyd F. MacMahon, United States Attorney.

Certificate of Service (omitted in printing)

[fol. 244] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

JOINT BRIEF OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Statement

This suit was commenced on June 6, 1955, with the filing of an action to set aside two orders of the Interstate Commerce Commission, dated March 2, 1955, and May 24, 1955, in Finance Dockets Nos. 14692 and 18656, insofar as such orders approved and authorized the application of Alleghany Corporation filed with the Commission in September, 1954. In this application the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (hereinafter referred to as "Big Four"), the Louisville & Jeffersonville Bridge & Railroad Company (hereinafter referred to as "Jeffersonville"), the New York Central Railroad Company (hereinafter referred to as "Central"), and the Alleghany Corporation (hereinafter referred to as "Alleghany"), jointly applied under Section 5(2) of the Interstate Commerce Act [fol. 245] for approval and authorization of (1) (a) merger of the properties and franchises of the Jeffersonville into Big Four, and (b) modification of the lease of January 2, 1930, under which Central, as lessee, operates the property of Big Four, lessor, to give effect to the acquisition of the additional property pursuant to the proposed merger of Jeffersonville into Big Four; (2) acquisition by Central and Alleghany, by virtue of their control of Big Four, of control of the properties of the Jeffersonville; and (3) continuation of Alleghany's status as a carrier, subject to the provisions of Section 20(1) to (10), inclusive and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

In the order dated March 2, 1955, Division 4 of the Commission approved the application. Following the filing of petition for reconsideration, the entire Commission, in a report and order dated May 24, 1955, affirmed the decision of Division 4.

The thrust of the plaintiffs' attack on the Commission's order, as contained in the complaint which was filed on June 6, 1955, was not that the Commission erred in authorizing the merger, or in approving the modification of the lease between Central and Big Four, but that the Commission erred in holding that Alleghany should be considered a carrier, and therefore subject to that agency's jurisdiction pursuant to Section 5(3) of the Interstate Commerce Act.

The plaintiffs asked for a temporary injunction against the two orders of the Commission dated March 2, 1955, and May 24, 1955. Prior to a hearing on this motion, the Commission in an order dated June 22, 1955, in Finance [fol. 246] Docket No. 18866, finally approved an offer by Alleghany whereby holders of its 5½%, Series A, preferred stock might, at their option, exchange their stock for stock in a new issue of convertible 6% preferred stock. This order of June 22, 1955, resulted from an application filed by Alleghany on February 18, 1955, in which it sought authority under Section 20(a) of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6% convertible preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½%, Series A, preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6% preferred stock. Division 4 of the Commission, in an order and report dated May 26, 1955, approved the application, and the entire Commission on June 22, 1955, affirmed the order of Division 4. Without filing a complaint attacking these two latter orders of the Commission, the plaintiffs sought and secured an ex parte restraining order against them. It was agreed by stipulation between the parties that the scope of the original suit filed on June 6, 1955, should be considered to include, for purposes of the temporary injunction, a prayer for the enjoining of the two orders of the Commission approving the proposed exchange of preferred stock of Alleghany. A 3 judge court, one judge dissenting, granted the temporary injunction. Subsequently, the plaintiffs sought leave to file a "Supplemental Complaint" in which they attack and seek to set aside the orders of the Commission issued on May 26, 1955,

and June 22, 1955, approving the proposed exchange of preferred stock of Alleghany.

[fol. 247] In substance, the plaintiffs' position is that the Commission erred both in holding that Alleghany, a noncarrier, should be considered as a carrier, pursuant to the provisions of Section 5(3), and in failing to afford them an opportunity to present evidence and to participate in a hearing in the proceeding in which the Commission found the status of Alleghany to be a "carrier" within the meaning of the Act.

Argument

I

The Interstate Commerce Commission Was Authorized by Section 5(3) of the Interstate Commerce Act to Find That Alleghany Should Be Considered as a Carrier Within the Meaning of Section 5(2), Even Though the Commission Had Never Authorized Alleghany to Obtain Control of Central, and Alleghany Had Never Sought Authority From the Commission to Obtain Control of That Railroad

Section 5(2)(a) provides that it shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or for any carrier, or two or more carriers jointly, to lease or operate the properties of another carrier, or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise. This same Section 5(2)(a) also provides, (and this is the pertinent part for our consideration here) that it shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for a person which is not a carrier to acquire control of two or more carriers through ownership of their [fol. 248] stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise.

The entire Commission, in its report of May 24, 1955, took the position that, when a noncarrier acquires a rail-

road system, it is not necessary for that person to obtain the approval of the Commission even though the system is made up of several railroads. The Commission in this connection stated (Sheet 10):

> "We conclude that at the time of its [Alleghany's] acquisition of control of the Central on May 26, 1954, it was in fact a 'person not a carrier' as that phrase is used in section 5(2) of the act. As Central, at the time of such acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the act and that our approval was not necessary."

It is submitted that this construction of the statute by the Commission is a reasonable one. It has repeatedly been held that the interpretation of an act by the agency charged with its enforcement is entitled to great weight. See, for example, *United States* v. *American Trucking Associations*, 310 U. S. 534, 549 (1940); *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 280 (1929); *United States* v. *Alabama Railroad Co.*, 142 U. S. 615 (1892).

As the Commission pointed out, to give Section 5 an interpretation which would require its approval each time stockholders decided to change directors of systems, or to elect new officers and to install new management, might very well set in motion within the organizations composing the system contending forces which conceivably could destroy the results of legitimate integration. The Commission's interpretation of the statute has the merit of per- [fol. 249] mitting this turnover in control of railroad systems without the necessity of obtaining the Commission's authority in advance, while at the same time requiring Commission approval when those in control seek to modify existing relations and change the status of the constituent lines making up the system.

While it may be contended that in the instant case the merger of the Jeffersonville into Big Four is not of substantial significance, still, even if this were true, the Commission, in interpreting the statute, must look beyond the mere confines of the instant case to other situations in which

it is easy to imagine that the modification or change in the status of lines making up a system might very well be of great significance. It is for this reason that the Commission has construed the statute as requiring its approval of any modification in the composition of a system. In other words, when those in control of a system treat individually the lines making up the system, then the Commission considers the lines as separate carriers. Thus, for example, if one line making up a system controls another line of a system through lease, that lease has a terminal date. However, if the lessee seeks to merge the lessor into its own line, that would forever foreclose the lessor from operating as an independent unit, and it is therefore reasonable for the Commission to require approval of such a transaction; for the proposal constitutes a change in the type of control presently existing. While it may be attempted to discount the importance of this change in the instant case the fact remains that in other cases, the change may have real substantial significance. It is therefore respectfully submitted [fol. 250] that the Commission's interpretation of the statute is a reasonable one and one which should not be overturned lightly.

The Commission has consistently taken the position that changes within a system, such as by merging one line into another, subject the noncarrier parent to regulation pursuant to Section 5(3). See *Chesapeake & Ohio Ry. Company, Purchase*, 261 I. C. C. 239; *Nicholas, Fayette & Greenbrier R. Co.*, 261 I. C. C. 546; *Warrior & Gulf Nav. Co.*, 250 I. C. C. 26; *United Parcel Service of Portland, Purchase, Wiese*, 37 M. C. C. 473; and *A. T. & Santa Fe. Ry. Co.—Control—Santa Fe Trail Trans.*, 15 M. C. C. 469. As previously pointed out, the statute, Section 5(2)(a), requires that consolidation between carriers have Commission approval. It has been recognized by the Supreme Court that the controlling person is a necessary party in a proceeding for approval of acquisition of the properties of a motor carrier subject to the act by a motor carrier controlled by a person not a carrier. See *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). As above discussed, it is in compliance with the obvious intent of the Act to require that changes in relationships between carrier members making up a system be approved by the Commission.

It is likewise obviously within the purpose of the Act, where a noncarrier attempts to change the relationship between the members of a system, that he should come within the jurisdiction of the Commission. This is the Commission's holding here, and it is submitted that it is a reasonable interpretation of the statute.

Regardless of whether this control of Central by Alleghany (assuming it was actual control, which point will be considered subsequently) was obtained lawfully or not, [fol. 251] the fact was the Commission had to consider it as an actuality at the time the application was filed by Alleghany seeking approval of the proposed merger of Jeffersonville into Big Four.

Division 4 in its March 2, 1955, report clearly recognized the fact that, whether Alleghany's control of Central was legal or not, it was a fact. Thus, it stated (Sheet 16):

> We recognize that the present control of the Central system has passed to Alleghany by regular corporate procedures even though our approval in the premises has not been sought. The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility.

If the control had been illegally acquired, there were available remedies to cover that situation, but the fact that it had been illegally acquired would not prohibit the Commission from acting on the merger application. In that application the Commission was solely interested in the actuality of the control by Alleghany of Central and not whether that control had been legally or illegally acquired. The application that the Commission had before it did not call for the approval or disapproval by the body of Alleghany's control of Central. Therefore, the Commission was not required to make findings as to whether Alleghany's control of Central would be consistent with the public interest or not.

The question whether Alleghany was in legal control of Central was and is a collateral issue in the determination of the application for the merger and declaration of carrier status. That issue would not come up until Alleghany itself

applied for approval of its control of Central, and it has [fol. 252] never filed such an application. If Alleghany is wrong in its assumption that it was not necessary for it to obtain approval from the Commission before acquiring the Central system, then it stands exposed to the penalties of the Interstate Commerce Act for acquiring such control without approval. It was not the function of the Commission in this merger proceeding to delve into this collateral issue of the legality of control. Surely, it was not incumbent upon the Commission to do so, even assuming it had authority to engage in such an undertaking on the existing application which was then pending before it.

II

The Findings of The Commission Furnish a Rational Basis for Its Determination that Alleghany Controls Central

It is submitted that the findings of Division 4 in its March 2, 1955, report and those made by the entire Commission in its May 24, 1955, report, furnish a rational basis for the Commission's conclusions that Alleghany controls Central, and under the Supreme Court's decisions, that is all that is necessary for the validity of this determination. The entire commission in its report stated (Sheet 9):

> The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the view of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central.

Division 4 made a number of findings in support of its conclusion that control of Central rested with Alleghany. Thus it noted that Alleghany had an undivided half interest [fol. 253] in 600,000 shares of Central stock, with voting rights to the 600,000 shares under joint venture agreements, and in addition that it owned 15,500 shares; that the voting rights of Alleghany represented almost 10% of the

total shares of Central outstanding; that the chairman of the board of directors of Alleghany, who then held the same position with Central, beneficially owned 100,200 shares of the latter's stock; that the president of Alleghany was a director of Central, and beneficially owned 300,100 shares of the latter's stock; that a vice president of Alleghany held a similar position with Central (Sheet 3).

It is submitted that in determining corporate control the test is a realistic appraisal of facts by the expert body familiar with the realities of rail intercorporate control. In *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125 (1939), the issue was whether the Federal Communications Commission had properly determined that it had jurisdiction over a telephone company because of its "control" by another, which was admittedly subject to the Commission's control. In upholding the Commission's determination, that it had control, the Supreme Court held that such control was not to be determined by any artificial test, but by the special circumstances of each case, and that the Commission's determination should be sustained if there was a rational basis for its conclusion. In this connection, the Supreme Court stated (pp. 145-146):

> The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply [fol. 254] artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the

administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, *et seq.*

It is submitted here that the findings of the Commission fully warranted it in reaching the determination it did that Alleghany had control of Central within the meaning of Section 5 of the Interstate Commerce Act.

III

The Commission Did Not Err in Refusing to Grant the Plaintiff's Request for an Evidentiary Hearing

It has been recognized by the courts that in a Section 5 application the Commission has extraordinary discretion. In pointing out this fact, it has been noted that the Commission in a Section 5(2) proceeding does not even have to conduct a hearing where rail carriers are not involved. Even where such carriers are involved, it may, under the terms of the statute, dispense with a hearing, if it determines that a public hearing is not necessary in the public interest. In *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79 (W. D. Va., 1942), the court stated (p. 82):

> [fol. 255] It would be difficult to conceive of a statute which confers broader authority and greater administrative discretion than Section 5 of the Interstate Commerce Act. Under that section, the Commission may approve any merger, purchase, consolidation, lease or contractual arrangement affecting motor carriers which it finds will be "consistent with the public interest". *Moreover, except where rail carriers are involved, transactions within the scope of Section 5 may be approved by the Commission without a hearing.* In the instant case, however, a public hearing was held at which the parties exercised the rights given to them to introduce testimony and to examine witness. [Italics supplied.]

In this case Division 4, in its March 2, 1955, report, specifically found (Sheet 2):

> We are of the opinion that a public hearing is not necessary in the public interest for the reason that the

proposed merger will simplify the corporate organization of Big Four, and that the related proposed transactions, subject to the terms and conditions specified herein, will not adversely affect transportation service available to the public.

In Section 5(2)(b), where it is set forth that a public hearing is only required in certain circumstances, and even there may be dispensed with by the Commission, there is a provision that whenever a transaction is proposed under Section 5(2)(a) the Commission shall give notice to certain parties and "shall afford reasonable opportunity for interested parties to be heard." However, it is submitted that that opportunity to be heard merely is to insure interested parties an opportunity to present reasons why a public hearing should be held and that it does not require an adjudicatory hearing; otherwise the overriding provision in the statute, which states that a public hearing is not required except under certain circumstances, would be a futility. It is submitted that the Commission acted well within its discretion in refusing to give the plaintiffs an opportunity to participate in an evidentiary hearing. As [fol. 256] the entire Commission in its May 24, 1955, report found, the interveners were concerned primarily with the interpretation of Paragraphs (2) and (3) of Section 5 of the Act, that is, they were concerned with a question of law, not a question of fact, and the Commission concluded that "there is no need to order a hearing." In permitting plaintiffs to intervene for purposes of argument, in the form of briefs and their petition for reconsideration of the report of Division 4, the Commission gave them every opportunity to present their views as to the law and the proper interpretation of Section 5 of the Interstate Commerce Act.

It is submitted, therefore, that no error has been shown in the Commission's denial of the plaintiffs' request for an opportunity to participate in an evidentiary hearing. In fact, the petitions of the plaintiffs filed with the Commission clearly reveal that they sought this opportunity in order to go into a number of collateral issues that had no relevancy to a determination of the questions which were before the Commission.

IV

The Commission Did Not Commit Error by Refusing to Grant the Petition of the Securities and Exchange Commission That the I. C. C. Should Waive Its Jurisdiction Over Allegheny and Permit the SEC to Regulate That Company

The Commission took the position that Section 5(3) of the Interstate Commerce Act did not permit it to waive jurisdiction in favor of the Securities and Exchange Commission, but that whenever it authorized a person not a car- [fol. 257] rier to participate in a Section 5 transaction, such person thereafter should, to the extent provided by the Commission in such order, be considered as a carrier subject to the provisions of the Interstate Commerce Act specified in Section 5(3). The Commission stated why it would be inadvisable to permit the overlapping of its and the Securities and Exchange Commission's jurisdiction over such a carrier. See the March 2, 1955, report of the Commission, Division 4, Sheets 15-16, and the May 24, 1955, report of the entire Commission, Sheets 2, 4-6.

It is submitted that the Commission's construction of the statute in this respect is a reasonable one, and that in any case, the Commission definitely had discretion to refuse to waive jurisdiction to the S. E. C., and the exercise of this discretion is not subject to challenge in the courts.

[fol. 258] Conclusion

For the foregoing reasons, it is respectfully submitted that the complaint in this case should be dismissed for the Commission's action is valid and therefore should not be set aside by the Court.

Respectfully submitted.

Albert Parker, John H. D. Wigger, James H. Durkin, Special Assistants to the Attorney General, Department of Justice, Washington 25, D. C., Attorneys for the United States of America, Leo H. Pou, Associate General Counsel.

Stanley N. Barnes, Assistant Attorney General.
Lloyd F. MacMahon, United States Attorney.

Samuel R. Howell, Acting General Counsel.
Attorneys for the Interstate Commerce Commission.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 259] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE PROPOSED PLAINTIFFS' SUPPLEMENTAL COMPLAINT—Filed August 31, 1955

On the assumption that the plaintiffs will be permitted by the Court to file herein their proposed supplemental complaint, a copy of which was attached to the order to show cause herein issued by Judge Dimock on July 8, 1955, now comes the Interstate Commerce Commission and, for answer to the said supplemental complaint:

I

Admits the allegations in paragraphs 1, 2, and 3.

II

Admits the allegations in paragraph 4, except the allegation that the Commission "withheld publication and service of said order upon plaintiffs until issuance of the order of Division 4 dated May 26, 1955." The Commission denies any inference which may be drawn from the said allegation to the effect that it deliberately or intentionally [fol. 260] withheld from the plaintiffs information as to the order permitting their intervention in the said proceeding.

III

Admits the allegations in paragraphs 5, 6, and 7.

IV

Neither admits nor denies the allegations in paragraphs 8 and 9, being without knowledge thereof.

V

Admits the allegations in paragraph 10.

VI

Denies the allegations in paragraph 11.

VII

Neither admits nor denies the allegations in paragraphs 12 and 13, being without knowledge thereof.

VIII

Denies the allegations in paragraph 14.

IX

Neither admits nor denies the allegation in the first sentence of paragraph 15; and denies the remaining allegations in said paragraph and those in paragraph 16.

X

Admits the allegations in the first two sentences in paragraph 17, and denies the remaining allegations in said paragraph and those in paragraph 18.

[fol. 261]

XI

Neither admits nor denies the allegations in paragraphs 19 and 20, being without knowledge thereof.

XII

Admits the allegation in the first sentence of paragraph 21 and denies the remaining allegations in said paragraph and in paragraphs 22, 23, 24, 25, 26, and 27.

XIII

Further answering the said supplemental complaint, the Commission alleges that the findings and conclusions set

forth in its report of May 26, 1955, upon which the orders assailed by the plaintiffs are based, were and are, and each of them was and is, fully supported and justified by the evidence submitted in the said proceeding and by the law applicable thereto; and that in making its said report and the said orders the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition brought to its attention by or on behalf of the parties to the said proceeding. The Commission further alleges that the said report and orders were not made or entered either arbitrarily or unjustly, or without substantial evidence to support them, or contrary to the relevant evidence, or otherwise than in conformity with the applicable statutes; and that in making said report and orders the Commission did not exceed the authority conferred upon it by law. The Commission denies each of and all the allegations to the contrary contained in the said supplemental complaint, and expressly denies that its said report and orders here under attack are invalid or illegal for any of the reasons therein alleged, or for any other reason.

[fol. 262] All of which matters and things the Commission is ready to aver, maintain and prove, as this Honorable Court shall direct, and hereby prays that the said complaint be dismissed.

Interstate Commerce Commission, By: Samuel R. Howell, Acting General Counsel, Leo H. Pou, Associate General Counsel, Address: Interstate Commerce Commission, Washington 25, D. C.

[fol. 263] CERTIFICATE OF SERVICE

(omitted in printing)

[fol. 264]. [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ANSWER OF JOSEPH S. GRUSS, ET AL., TO THE PROPOSED SUPPLEMENTAL COMPLAINT—Filed September 1, 1955

Defendants, Joseph S. Gruss, et al., doing business as Gruss & Co., by Proskauer Rose Goetz & Mendelsohn, their attorneys, reserving their rights to have stricken from the complaint such allegations of plaintiffs' supplemental complaint as are improperly incorporated therein, for their answer to said supplemental complaint:

First: Deny each and every allegation of paragraph "3", except that they admit the filing of the application referred to in said paragraph.

Second: For their answer to paragraphs "4" and "7" these defendants neither admit nor deny the allegations therein contained, but respectfully refer the Court to the orders or documents referred to therein for their exact terms.

Third: Deny that they have any knowledge or information sufficient to form a belief as to the allegations of paragraphs "8", "9" and "10", except that these defendants admit that approximately 900,000 shares of convertible preferred stock were distributed prior to the issuance of [fol. 265] a restraining order by this Court and that such a restraining order was issued on June 23, 1955.

Fourth: Deny each and every allegation of paragraphs "11", "13", "14", "15", "16", "18", "19", "20", "21", "22", "23", "24", "25", "26", and "27".

Fifth: For its answer to paragraph "17" of said supplemental complaint, these defendants respectfully refer the Court to the orders of the Interstate Commerce Commission for the exact terms thereof and the findings made therein and deny each and every allegation contained in said paragraph which characterizes and presents conclusions with respect to the contents of such orders and findings.

As a First, Separate and Affirmative Defense, These Defendants Allege:

Sixth: Plaintiffs, the holders of approximately .002% of the common stock of the Alleghany Corporation, have no standing to sue in this action to review the orders of the Interstate Commerce Commission which (a) adjudicated the status of the Alleghany Corporation as a carrier, and (b) passed upon and approved the exchange offer referred to in the complaint.

As a Second, Separate and Affirmative Defense, These Defendants Allege:

Seventh: The order of the Interstate Commerce Commission declaring Alleghany to be a carrier continues in full force and effect until the same is vacated, either by a new order of the Commission or an order of a court of competent jurisdiction; therefore, the non-mandatory order of approval of the exchange offer herein was and is [fol. 266] valid and may not be retroactively affected by a later determination of this Court respecting the status of Alleghany as a carrier, and plaintiffs are not entitled to an order annuling said order of approval of the exchange offer, nor a permanent injunction restraining the carrying out of the exchange offer, and the issuance, distribution and transfer of the 6% convertible preferred stock as prayed for in the complaint, or restraining other acts in respect of said exchange offer.

As a Third, Separate and Affirmative Defense, These Defendants Allege:

Eighth: A permanent injunction restraining the defendant Alleghany and others from carrying out the exchange offer herein should in no event be granted, since untold hardship would be created by such an injunction, the preferred stockholders of Alleghany Corporation, represented by these defendants, would suffer incalculable harm by such an injunction, whereas plaintiffs would suffer little or no harm, if their prayer for such an injunction be denied.

Wherefore, these defendants pray that plaintiffs' complaint be dismissed.

Proskauer Rose Goetz & Mendelsohn, By —— ——, A Member, Attorneys for defendants Joseph S. Gruss, et al., doing business as Gruss & Co., Office & P. O. Address, 11 Broadway, New York 4, N. Y.

[fols. 267-270] AFFIDAVIT OF SERVICE

(omitted in printing)

[fol. 271] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER TO SHOW CAUSE WHY LEAVE SHOULD NOT BE GRANTED TO MYRON NEISLOSS TO INTERVENE, ETC.—February 8, 1956

Upon the annexed petition of Myron Neisloss, verified September 6, 1955, and all prior proceedings herein, let the defendants herein show cause before this Court at Room 1705 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, on September 14, 1955, at 10:30 a. m., why an order, substantially in the form of the annexed proposed order, should not be made herein, and why petitioner should not have such other and further relief as may be just.

Sufficient reason appearing therefor, let service of this order be made by serving a copy thereof, together with the papers on which it is based, upon the attorneys for the defendants herein, on or before 5 p. m., September 8, 1955, and let such service upon the United States Attorney for the Southern District of New York constitute service upon the defendants, United States of America and Interstate Commerce Commission.

Dated: New York, N. Y., September 6, 1955.

Lawrence E. Walsh, United States District Judge.

[fol. 272] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION—September 6, 1955

To the Honorable Judges of the United States District Court:

Petitioner, Myron Neisloss, by Rosston, Hort & Brussel, his attorneys, for his petition herein, states:

1. I am the beneficial owner of 1,000 shares of the common stock of defendant Alleghany Corporation; I have continuously been the owner of from 100 to 1,000 of said shares since July 24, 1953.

2. I ask this court to permit me to intervene herein as party plaintiff individually and on behalf of all other common stockholders of Alleghany Corporation.

3. I have been and am co-plaintiff with plaintiff Breswick & Co., in Breswick & Co. v. Briggs, civil action No. 98-371, since its inception on February 14, 1955.

4. I desire to assist the plaintiffs herein in the prosecution of this action. I will be represented by Rosston, Hort & Brussel, attorneys for plaintiff Breswick & Co.

5. I seek the entry of the annexed proposed order which provides, *inter alia*, that my intervention shall be without prejudice (1) to all prior proceedings herein; (2) to the pending motions of defendant Alleghany Corporation ad-[fol. 273] dressed to the original and to the supplemental and amended complaints; (3) the pending motion of defendant Shufro for leave to sue representatively; (4) the pending motion of defendant Interstate Commerce Commission to quash service of a subpoena; (5) the pending motion of plaintiffs for leave to amend their pleadings to sue representatively. Said order also provides that my intervention shall not break the issues herein; that no responsive pleading shall be required and that, if defendants or any of them so elect, the single sentence to be added to the complaint and to the supplemental and amended complaint herein shall be deemed denied without further pleading on their part.

6. The proposed order further provides that plaintiffs' pleadings herein are adopted by me in their present form or in such form as such pleadings shall be further amended pursuant to motions now pending before the court; and that upon the entry of such order the plaintiffs' pleadings shall be deemed so adopted without the necessity of further service on the defendants and without obligating defendants to answer same.

7. My intervention is necessary and desirable because: (a) defendant Alleghany Corporation has questioned the stockholder status of the present plaintiffs and this important case should not be prejudiced by any merely technical defect, if such there be: (b) the present plaintiffs own only 700 shares of Alleghany Corporation and my holdings of an additional 1,000 shares will strengthen their position: (c) my stockholder interest in Alleghany Corporation antedates the Alleghany Corporation divestiture of the Chesapeake & Ohio Railroad Co.

8. Because the final hearing of this cause impends I ask for short return on the annexed proposed order to show [fol. 274] cause and request that service upon the defendants, United States of America and the Interstate Commerce Commission, be made upon the United States Attorney for the Southern District of New York.

9. I have made no previous application for this or similar relief.

Wherefore, I pray for the issuance of the annexed proposed order to show cause.

Myron Neisloss, Petitioner.

Dated: New York City, New York, September 6, 1955.

* * * * * * *

[fol. 275] *Duly sworn to by Myron Neisloss. Jurat omitted in printing.*

[fol. 276] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

* * * * * * *

PROPOSED ORDER

Petitioner, Myron Neisloss, having moved this Court for leave to intervene herein as a party plaintiff, and said motion having been granted, it is

Ordered that:

1. Myron Neisloss be granted leave to intervene herein as a party plaintiff.

2. Said intervention shall be without prejudice to all prior proceedings herein and all pending motions herein.

3. The complaint and the supplemental and amended complaint shall be deemed further amended by adding to paragraph "3" of the complaint, a new sentence reading as follows:

> "Petitioner Neisloss, since at least July 24, 1953, has been the beneficial or record owner of from 100 to [fol. 277] *to* 1,000 shares of the common stock of Alleghany Corporation and continues to be the beneficial owner of said 1,000 shares of said stock."

4. Said Intervention shall not break the issues herein and no responsive pleading shall be required of any defendant, but any defendant may elect at the trial, to deny the above pleaded matter: failing such denial, the above pleaded matter shall be deemed admitted.

5. Except as aforesaid, the complaint and the amended and supplemental complaint, without service thereof upon any of the defendants, shall be adopted by, and shall become the pleading of petitioner, who shall be bound by all orders made on pending motions addressed to the complaint, or to the amended and supplemental complaint, or otherwise.

6. Petitioner's application for leave to sue in a representative capacity is reserved for disposition with the pending motions of defendant Shufro and plaintiffs Breswick & Co. and Randolph Phillips, for the same relief.

7. The title of this action hereby is amended to read as follows:

"United States District Court, Southern District of New York

[fols. 278-279] Breswick & Co., Randolph Phillips and Myron Neisloss, as Common Stockholders of Alleghany Corporation, Plaintiffs

against

United States of America; The Interstate Commerce Commission; Alleghany Corporation; The New York Central Railroad Company; Joseph S. Gross, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner, and Alvin J. Delaire, a copartnership, doing business as Gruss & Co.; Samuel A. Mehlman; Salwyn Shufro; Baker, Weeks & Co.; Oscar Gruss & Son; Irving Neuman, as Trustee under a Deed of Trust dated November 6, 1943; and Edward Gornish, Defendants"

and the summons herein is deemed amended accordingly.

September , 1955.

——, U. S. D. J.

[fol. 280] Disposed of as indicated in Order, December 23, 1955.

[fol. 281] In United States District Court

Affidavit—Filed February 20, 1956

* * * * * * *

Washington,
District of Columbia, ss.:

I, Adolphus Ragan, being first duly sworn on oath, depose and say:

I am a resident of the State of New York, temporarily visiting Washington, D. C.

I am the owner of twenty-six thousand (26,000) shares

of Alleghany common stock and have been owner of these shares since prior to February 8, 1955. I am informed that Breswick & Company and Randolph Phillips, in an action brought by them against the United States and the Interstate Commerce Commission in the United States District Court for the Southern District of New York, seek to represent all common stockholders of Alleghany as a class.

I also understand that in their action they seek to have an order of the Interstate Commerce Commission considering Alleghany a carrier under the Interstate Commerce Act and an order of the Interstate Commerce Commission approving the exchange of a new 6% preferred stock for the existing 5½% preferred stock of Alleghany. I support both of these orders of the Interstate Commerce Commission and oppose the issuance of any court order enjoining the Commission's orders. I also oppose any attempt by Breswick, Phillips or any other common stockholder to speak for me and for other common stockholders in opposition to the aforesaid Commission orders.

[fols. 282-283] I make this affidavit on my own initiative and not at the suggestion of Robert R. Young or any officer or director of Alleghany Corporation. I have no connection with any of them.

I did not vote my stock at the special stockholders meeting held on February 8, 1955 to approve the exchange offer.

Adolphus Ragan.

* * * * * * *

Duly sworn to by Adolphus Ragan. Jurat omitted in printing.

[foll 284] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF PETER I. B. LAVAN—Filed February 20, 1956

STATE OF NEW YORK,
County of New York, ss.:

Peter I. B. Lavan, being duly sworn, says:

I am an attorney at law and senior partner of the law firm of Stroock & Stroock & Lavan. I am represented in this action by Messrs. Cahill, Gordon, Reindel & Ohl, who appear for me, as well as others, *amicus curiae*.

I am the holder of 7,000 shares of common stock of Alleghany Corporation which I purchased in November and December of 1954. I hold no other shares of any other class of Alleghany Corporation.

I have hitherto voiced through the Cahill office my opposition to the position of Mr. Phillips and Breswick & Co. I am informed that one, Neisloss, purported owner of 1,000 shares of Alleghany Corporation, proposes to intervene in this action and to maintain a class action on behalf of common stockholders. I believe that I more adequately represent the class than Messrs. Neisloss, Phillips, or Breswick & Co., inasmuch as my stockholdings alone are several times the aggregate of their stockholdings. I believe that it is to the interest of the common stockholders that the status of Alleghany Corporation as a non-carrier considered as a carrier under the Interstate Commerce Act [fols. 285-288] be maintained, and that it is to the interest of all the common stockholders of Alleghany Corporation that the exchange offer of 5½% preferred stock for 6% preferred stock be consummated in all respects. I point out that the decisions of this and other Federal courts demonstrate that Rule 23, F. R. C. P., requires adequate representation of a class by those who purport to act for the class. Neither Breswick & Co., Phillips nor Neisloss, individually or in the aggregate, adequately represent the

class of common stockholders. I am informed that 97½% of common stock voting approved the exchange offer. I am also informed that the common stock voting for the exchange offer represented over 70% of the common stock.

Peter I. B. Lavan

* * * * * * *

Duly sworn to by Peter I. B. Lavan. Jurat omitted in printing.

[fol. 289] IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

EXCERPTS FROM STENOGRAPHIC PROCEEDINGS OF SEPTEMBER 14, 1955

Before: Hon. Jerome N. Frank, Circuit Judge, Hon. Edward J. Dimock, and Hon. Lawrence E. Walsh, District Judges.

* * * * * * *

APPEARANCES:

Rosston, Hort & Brussel, Esqs., Attorneys for Plaintiff Breswick & Co.; George Brussel, Jr., Esq., of Counsel.

Randolph Phillips, Esq., pro se.

White & Case, Esq., Attorneys for Alleghany Corporation; and

[fol. 290] Wheeler & Wheeler, Esqs., Burton K. Wheeler, Esq., David Hartfield, Jr., Esq., Edward Wheeler, Esq., and Morton Moskin, Esq., of Counsel.

Cahill Gordon Reindel & Ohl, Esqs., Amicus Curiae, representing Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder Peabody & Co., E. F. Hutton & Co., Eisle & King, Gruss & Co., Abraham & Co., Goldman Sachs & Co., Mr. Samuel Mailman, Bear Stearns & Co., Peter Lavan; Thomas C. Mason, Esq., of Counsel.

John H. D. Wigger, Esq., Special Assistant to the Attorney General for the United States.

Leo H. Pou, Esq., Attorney for the Interstate Commerce Commission.

John D. Roeder, Esq., Executive Assistant United States Attorney for the Southern District of New York; George Vetter, Esq., of Counsel,

Harold H. McLean, Esq., and

Edward K. Wheeler, Attorneys of record for The New York Central Railroad Company. Arthur H. Bernstein, of counsel.

[fol. 291] Proskauer, Rose, Goetz & Mendelsohn, Esqs., For Joseph S. Gruss, et al. Harold H. Levin, Esq., of Counsel.

Samuel A. Mehlman, Esq., pro se

Edward M. Garlock, Esq., For Baker Weeks & Co.

Krause, Hirsch, Levin & Heilpern, Esqs., For Salwyn Shufro By Sidney Krause, Esq., of counsel.

* * * * * * *

[fol. 292] Mr. Brussel: One of the defendant intervenors asks for the same relief. He asks to defend representatively, and we felt it is additional ground for giving us the right to sue representatively.

With respect to your Honor's question on the other motion, I must say in all candor that I don't think that this Court can consider the stockholding status of the plaintiffs in this case, that it could take testimony with respect to it or make a finding de novo with regard to their status or lack of status or as to the date of their acquisition of the stock or as to whether there was any hiatus in the ownership of the stock.

We made the motion because many pages of the Alleghany brief constituted an attack and indicated that Alleghany wanted testimony taken. They invited the Court to [fol. 293] go into the matter.

If on such an inquiry any prejudice could result to the plaintiffs, then we wanted to be protected by the introduction of Mr. Neisloss as a party plaintiff in the case.

There can't be any issue as to his stock ownership. I don't believe there can be any issue as to the plaintiff

Phillips in any case, but certainly with regard to Mr. Neisloss, who has held his stock since 1953 and whose status as a stockholder has been under scrutiny in another Alleghany proceeding, where all the facts have been adduced for the benefit of Alleghany and where they have had an opportunity to satisfy themselves as to his status, that is not a question.

If this question is not going to be inquired into at this junction, I will withdraw the motion. If the Court is going to make a de novo inquiry, then of course we would want protection of Mr. Neisloss' intervention.

* * * * * * *

[fol. 294] Judge Frank: * * * I gather you say this, that [fol. 295] if it were true, and the evidence shows unmistakably that Kirby and Young, together with Alleghany, all three, were in control, one of those individuals would be the necessary party.

Mr. Wheeler: I agree if you consider Young, Alleghany and Kirby on this level, not if you try to reach them through Alleghany.

* * * * * * *

[fol. 296] Mr. Levin: Yes, sir.

Just one thing more. It may be necessary to submit some evidence and let me give you a sample of what I mean.

We had a lot of talk here about the stock ownership of the plaintiffs. There is nothing in the record, as far as I know, that sustains Mr. Hartfield's arguments based upon that. I think that while it is true——

[fol. 297] Mr. Hartfield: Yes, it is.

Mr. Levin: In this court you do not review new evidence on anything that was before the Commission when you are deciding the correctness of the Commission's determination. If you were going to grant an injunction, for example, a permanent injunction——

Judge Frank: Let us assume you have some evidence of what happened to the stock since the ICC order was entered. Suppose you make an offer of proof, and we will consider it and tender it to your adversaries and see what they have to say.

Mr. Levin: I just want to say this: Judge Dimock in his opinion on the motion for a temporary injunction had a great many things to say on that, and Judge Harlan and Judge Hincks, also, in his sustaining opinion.

This is a trial. We cannot consider affidavits, and we cannot consider oral statements——

Judge Frank: Why don't you put that in a memorandum of what you think ought to be determined on evidence. Probably most of it can be stipulated.

Mr. Levin: I hope so. With it I will give you the authorities I have already placed in a little memorandum [fol. 298] showing that that can at least be done—at least negatively.

Judge Frank: Certainly. Suppose they sold their stock since the suit began.

Mr. Levin: I think you would have to know what the facts are concerning the stock and the distribution and who owns it and what the facts are before you can render an intelligent judgment.

* * * * * * *

[fol. 299] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Proskauer Rose Goetz & Mendelsohn

(Rose & Paskus)

11 Broadway
New York 4, N. Y.

September 20, 1955

re Breswick & Co. and ano. v. *U. S., et al.*

Civil Action File No. 101-114

Honorable Jerome Frank, U. S. C. J.,
United States Court of Appeals,
Chambers of Judge Frank,
315 U. S. Courthouse and P. O. Building,
New Haven 6, Connecticut.
Honorable Edward J. Dimock, U. S. D. J.,
United States Court House,
Foley Square,
New York 7, New York.
Honorable Lawrence E. Walsh, U. S. D. J.,
United States Court House,
Foley Square,
New York 7, New York.

DEAR SIRS:

At the hearing in the above matter, the Court requested the undersigned, as attorneys for intervening preferred stockholders, to make their offer of proof in writing and authorized them to present a memorandum in support of their position that this Court of equity is empowered to take evidence on the present status of the exchange of stock, in order that it may properly mold its decree.

Without yielding their position that the findings of the ICC were adequate to support control, etc., the preferred stockholders, represented by the undersigned, urge upon this Court that if it should reach a contrary conclusion, the orders under review should be suspended rather than

annulled and the matter should be remanded to the ICC for further proceedings.

In support of such request and in order to enable this Court to take into account the position of the preferred stockholders, we make the following offer of proof:

[fol. 300] 1. Prior to the issuance of a restraining order by this Court all of the old 5½% preferred stock of the Alleghany Corporation tendered for exchange (all except 4000 shares were so tendered) was canceled and new 6% stock issued in place thereof. Almost 900,000 shares of said new stock were distributed and less than 400,000 remain undistributed.

2. A substantial number of shares of the new stock was traded on a "when issued" basis over the counter and on the Stock Exchange prior to the issuance of said restraining order.

3. A substantial number of shares of the new 6% preferred stock has been traded in the "regular way" on the New York Stock Exchange.

4. Following the issuance of an order staying in part the temporary injunction of this Court, a substantial number of shares of the new 6% preferred stock was sold and transferred.

5. The freezing of the holdings of preferred stockholders by the temporary injunction herein has caused great hardship to stockholders and to dealers in such stocks and the issuance of a permanent injunction would create irreparable damage to innocent third parties.

The facts which the preferred stockholders seek to put into the record are, for the most part, facts which have been adverted to in the opinions of Judges Dimock and Hincks and Justice Harlan who, in varying degree, recognized that the plight of the "innocent" stockholders—as Judge Dimock described them—was worthy of consideration.

With such evidence before the Court, it will become apparent that to annul the orders of the ICC approving the exchange offer and the issuance of the new 6% preferred stock thereunder would cause unnecessary delay and irreparable damage to third parties without benefit to plaintiffs. A completely new proceeding before the ICC might make it impossible to carry through the present exchange

offer and a new plan would involve resubmission to the stockholders with attendant delay, expense and harm to all classes of Alleghany stockholders, not excluding common stockholders.

We suggest that if this Court finds the basic findings of control, etc. inadequate to support the orders of the ICC, a more expeditious determination of the issues presented in this case will be effectuated if it suspends the orders [fol. 301] and remands the matter to the ICC. Such action would minimize the damage to the stockholders and to the public, and more particularly to the preferred stockholders who have already suffered great hardship from the freezing of their securities by the injunctions entered herein to date.

Respectfully submitted, Proskauer Rose Goetz & Mendelsohn, Attorneys for Joseph S. Gruss, et al., a co-partnership d/b/a Gruss & Co., Intervening Defendants, By: Harold H. Levin, A Member of the Firm.

[fol. 302] cc: Honorable Herbert Brownell, Jr., Attorney General of the United States of America, Department of Justice, Washington 25, D. C.

Honorable Paul W. Williams, United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Leo N. Pou, Esq., Interstate Commerce Commission, Washington 25, D. C.

White & Case, Esqs., 14 Wall Street, New York, N. Y.

Messrs. Rosston, Hort & Brussel, 141 Broadway, New York 6, New York.

Mr. Randolph Phillips, c/o Messrs. Rosston, Hort & Brussel, 141 Broadway, New York 6, New York.

Harold H. McLean, Esq., 466 Lexington Avenue, New York 17, New York.

Samuel A. Mehlman, Esq., 165 Broadway, New York 6, New York.

Messrs. Cahill, Gordon, Reindel & Ohl, 63 Wall Street, New York 5, New York.

Messrs. Krause, Hirsch, Levin & Heilpern, 521 Fifth Avenue, New York 17, New York.

Edward M. Garlock, Esq., 521 Fifth Avenue, New York 17, New York.

[fol. 303] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF RANDOLPH PHILLIPS—Filed February 29, 1956

STATE OF NEW YORK,
County of New York, ss.:

Randolph Phillips, being duly affirmed, deposes and says: I make this affidavit to supplement my affidavit, made June 15, 1955, in support of plaintiffs' application for a preliminary injunction.

1. Having been closely connected with the proxy campaign for control of New York Central (my affidavi- June 15, 1955, p. 4), I know of my own knowledge that extensive use was made of the United States Mails during the period April 8, 1954 through May 26, 1954, to solicit proxies.

2. Annexed to plaintiffs' memorandum in support of their motion for a preliminary injunction, as appendices thereto, are (a) a copy of the order of the Interstate Commerce Commission, dated June 5, 1945, in Finance Docket 14692, determining Alleghany Corporation to be a carrier by reason of its control of Chesapeake & Ohio Railway Company, and (b) a photostatic copy of evidence received at the hearings before the Sub-Committee on Appropriations, United States Senate, 83rd Congress, Seco- Session on H. R. 8583.

[fol. 304] 3. I turn now to the affidavit of David W. Wallace, which was served on me at half-past nine o'clock last night and is dated June 27, 1955. If Alleghany is held by this Court to have been an investment company subject to registration with the S. E. C. under the Investment Company Act, as plaintiffs believe this Court must find on the record, then I am advised by counsel the new 6% Pre-

ferred stock will be null and void and will not be validly issued. The cases relied on by Wallace at page 9 of his affidavit, I am informed by counsel, do not apply as they are not based on violations of Federal statutes such as the Securities Act of 1933 and the Investment Company Act of 1940. It is true that Alleghany will not become subject to the Investment Company Act "until such time as the S. E. C. affirmatively so desires after hearing". Section 7 of the Investment Company Act prohibits the issuance of such stock as the 6% Preferred stock by unregistered investment companies. Section 18(d) prohibits the issuance of "any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants all rights to subscribe expiring not later than 120 days after their issuance". The present Preferred Stock Plan intends the issue of a warrant or right to subscribe to 47 shares of Alleghany Common Stock for a minimum period of 15 years. If the new Preferred stock, with this warrant attached, is therefore issued and allowed to be transferred, there will be irreparable damage in the event this Court or the Supreme Court finds that Alleghany is not subject to the jurisdiction of the I. C .C. As for Wallace's statement that they have sources of information "are conversations had by Alleghany's counsel on this subject with staff members of the S. E. C.", may I point out on the basis of twelve years experience before that Agency, that staff members have no power to commit [fol. 305] the Agency, which is made up of five Commissioners and who, alone, have the power of decision. I do not deem it appropriate to go into the merits of the Exchange Plan at this time, but may I point out that the market value of a single warrant to subscribe to the common stock of Alleghany Corporation, after payment of $3.75 per share as is contemplated in the Preferred stock plan was $7⅜ at the close on the American Stock Exchange yesterday. Since each share of the Series A Preferred stock is to receive warrants to subscribe to 47 shares of Alleghany common on the terms mentioned, it is obvious that at the close yesterday, the market value alone of this privilege was worth no less than, roundly, $349.00. This compares with the maximum legal claim of the Series A Preferred stock (namely, a redemption value of $235⅝

as of February 10, 1955, of which $130⅝ per share represented unpaid dividends). (See p. 16 of Ex. E to the Wallace affidavit of June 27, 1955 herein). The I. C. C. cites no judicial or administrative precedent for handing out to the Preferred stockholders at the expense of the common, the difference of some $114 per Series A share represented by the above figures. Plaintiffs, on the other hand, in their petition for reconsideration, which they filed with the S. E. C. under date of June 1, 1955, brought the following judicial precedents to the attention of the Commission, which clearly outlaw a plan of this character. (pp. 7-9 of that petition set forth the following):

"IV

"The May 31st market quotation of $292 per share of the Series A Preferred is prima facie evidence of the impropriety of the plan, since the stock's maximum legal claim was $237, as of May 1, 1955.

"The most the Series A Preferred stockholders are [fol. 306] entitled to receive in any plan under 20a is the 'equitable equivalent' of their claim. *Group of Institutional Investors* v. *Chicago M. St. P. & P. R. Co.*, 318 U. S. 523, 565; *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 at 639-640, and cases cited therein.

"The fair and equitable rule is similar to the 'just and reasonable' rule of Section 20a, and this equitable rule enunciated 'in a federal statute of very similar purposes' applies to Section 20a proceedings. *Schwabacher* v. *U. S.*, 334 U. S. 182 at 198-199. 'Current worth * * * governs'. *Id.* at 199.

"Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders." *Otis* case at p. 637.

"It has never been held that a security with a marketable value, at the time of an administrative agency or court decision, of 123% of a maximum legal claim is the 'equitable equivalent' of that claim. To so rule would be to hold 123% equal to 100%.

"The windfall here attempted for the personal benefit of Mr. and Mrs. Robert R. Young and other Series A pre-

ferred stockholders is clearly improper and a fraud upon the common stockholders. This attempted 'windfall', it should be noted, as of May 31, 1955, amounts to more than 7 million dollars.

Point V

"Division 4 erred as a matter of law in holding that the stockholders vote was 'a sufficient answer' to the absence of arms-length negotiation.

"Concededly, Young dominates Alleghany. As a controlling person, and as a fiduciary of Alleghany he could not, as a matter of law, set Alleghany upon a course which would result in a personal profit. Such overreaching conduct is a fraud upon Alleghany not susceptible of ratifi- [fol. 307] cation by less than all of Alleghany's common stockholders. *Pollitz* v. *Wabash R. R. Co.*, 207 N. Y. 113; *Quintal* v. *Kellner*, 264 N. Y. 32; *Ward* v. *The City Trust Co.*, 192 N. Y. 61; *Continental Securities Co.* v. *Belmont*, 206 N. Y. 7.

"Division 4 attempts to excuse the absence of arms-length bargaining between holders of the common stock exclusively and holders of the preferred stock exclusively on the ground that 70% of the common stockholders (without being informed of the issues) voted to approve the plan. Such a vote is irrelevant to the charge and is not a 'sufficient answer' as held by Division 4 (Sheet 20).

"This finding of Division 4 violates the rule of the *Schwabacher* case, 334 U. S. at 201 that "The Commission is under a duty to see that minority interests are protected". The vote does not protect the non-voting minority owning 30% of the common stock. In any event the vote is irrelevant to the issues. *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, at 114-115."

As noted, the I. C. C. failed totally to pass on any of the issues so raised.

4. Although Wallace states that Alleghany now "owns 822,000 shares of New York Central stock", this fact was not before the I. C. C.

The Hoax Which Defendants Are Attempting to Perpetrate on This Court with Respect to Irreparable Injury.

5. If this Court will turn to pages 4 and 5 of Exhibit E to the Wallace affidavit dated June 27, 1955, they will find there a statement in the Exchange Offer of the "Method of Effecting Exchange". It will be seen therefrom that since February 10, 1955, the date of the document in question, stockholders had the right to deposit their stock with the Exchange Agent, and that this right continued until "not later than 3:30 P. M. on the closing date". The [fol. 308] closing date was five days (excluding Saturday, Sunday and any legal holiday) after the I. C. C. issued its order approving the stock issue (See p. 4 of Ex. E). The order of the I. C. C., upon which defendant Alleghany relies was that of Division 4 issued on May 26, 1955. Thus, the closing date was June 3, 1955.

In short, from February 10 to June 3, 1955, all the stockholders owning Series A stock who chose to accept the offer have been frozen by virtue of their deposit of the stock and by virtue of the further fact that no market existed in receipts for the deposit stock during that time.

The present restraining order does no more in substance and effect than prolong this freeze until it is determined whether the I. C. C. has jurisdiction. In other words, the only effect of this restraining order is to freeze, either in the hands of all the original Series A Preferred stockholders of record, who accepted the Plan, or, in the hands of Alleghany, the securities representing the new stock, or their receipts of certificates of deposit for the old stock. If that voluntary freeze of four weeks to almost five months' duration injured nobody, it is plain that prolongation of this freeze by this Court's restraining order for a similar period also would injure nobody. In other words, no stockholder has been able to buy, sell or borrow on his receipts during the four weeks to five months period, and no stockholder at the present time is able to do so by virtue of the restraining order.

6. As for Wallace's claim that all classes of all stock made new highs in trading on the New York Stock Exchange on Friday, June 24, 1955 prior to the public announcement of the restraining order was made, may I point

[fol. 309] out that there has been as of today, no essential change in those highs, despite the prophesies of doom expressed by Mr. Hartfield to the Court on Friday last, and that as shown by the New York Times financial pages on June 24th, the "market average pierces 1929 high" (p. 29).

The Alleged Damage to Alleghany from Preliminary Injunction.

Based on my knowledge of Alleghany's affairs during my employment with it and my general knowledge of I. C. C., S. E. C. and banking practice, I allege there is no substantial difficulty which will face Alleghany in the renewal of its $8,200,000 loan, due on September 16, 1955, if this Court grants a preliminary injunction. From November, 1940 to October 4, 1945, Alleghany was registered under the Investment Company Act. During that time it found no difficulty in functioning with respect to its bank loans or any other matter.

7. During the year 1954 alone, based on Alleghany's annual report, a copy of which I attached as Exhibit K to this affidavit, it sold securities which realized for it net profits of no less than $33,339,997 (see p. 13 of this Exhibit). At the end of 1954 Alleghany had total marketable securities on hand with an indicated market quotation of $67,944,633.00 (see p. 12 of Exhibit K). Obviously, therefore, no legitimate problem exists with respect to the repayment of this loan should such repayment become necessary, and of course, Alleghany would save the interest rate on the loan.

8. As for Alleghany's desire to redeem the 4700 shares of Series A Preferred stock, whose holders did not accept the Exchange Offer, no injury can occur to them by virtue [fol. 310] of leaving their stock outstanding a few months more since it has already been outstanding some 25 years or more. Insofar as the right of the Series A stockholders to elect directors is concerned, this right also exists in the new 6% stock, and since Alleghany does not intend to have the holders of both these classes elect any more than two charter-entitled directors, and since this matter is already before the Court in a collateral case, insofar as the holding of the annual meeting is concerned, it is obvious that this

Court of Equity has full power to deal with the situation and to indicate that all the holders of the Series A and the 6% Preferred stock, together, should be entitled to elect two directors and no more, when, as and if the annual meeting is held prior to the determination of the matters herein.

Randolph Phillips.

Affirmed to before me this 28th day of June, 1955.
Eugene G. King, Notary Public, State of New York, No. 03-7267750, Qualified in Bronx County, Certificate filed New York County, Commission expires March 30, 1956.

[fol. 311] EXHIBIT "K" TO AFFIDAVIT

ALLEGHANY CORPORATION

1954

Twenty-sixth Annual Report

* * * * * * *

[fol. 312] Alleghany Corporation

April 19, 1955.

To the Shareholders:

* * * * * * *

[fol. 313] New York Central

Last year's annual report announced the divestment of your Company's control of the Chesapeake and Ohio Railway and its intention of acquiring control of the New York Central Railroad Company. The year end found your Company in control of New York Central with a board of directors wholly of its own choosing. Until that control was an accomplished fact your Company put virtually nothing at risk although it made certain sound loans at advantageous interest rates which have since been resolved into highly valuable joint ventures.

At the present time your Company owns outright 387,000 shares of New York Central stock and through joint ven-

tures has the right to vote an additional 600,000 shares, a total controlling vote equal to 15.3 per cent of all outstanding New York Central stock. Under the joint ventures your Company is also guaranteed against loss, yet it enjoys a 50% participation in the profits.

On December 13, 1954 your Company also was given valuable options to purchase 135,000 of the shares held under the joint ventures in three equal blocks of 45,000 shares each at prices of $25, $30 and $35 respectively, until 183 [fol. 314] days after $5 in excess of each of those prices is first attained on the New York Stock Exchange. It now looks as though it will be in your Company's interest to exercise these options before they expire.

Under the able Presidency of Mr. Perlman who assumed office June 14, New York Central has already undergone a remarkable metamorphosis, with a profit of $15,889,365 in the last six months of 1954 in contrast to a loss of $6,701,-856 for the first six.

Central's new year, 1955, has begun auspiciously with a profit of $5,291,810 for the first two months against a loss of $3,898,478 in the same months of 1954, the volume of traffic and rate level being unchanged and despite the fact of a substantial increase in wage rates.

On January 11th the Central's directors placed the stock on a $2 annual basis by a 50 cent dividend declaration for the first quarter. Not since 1931 have stockholders been paid a regular quarterly dividend.

Your management feels that under your Company's control the New York Central offers far greater potentialities for eventual substantial profit than did well managed C&O.

* * * * * * *

[fol. 315] By order of the board of directors,
Robert R. Young, Chairman, Allan B. Kirby, President.

[fol. 316].

ALLEGHANY CORPORATION

Balance Sheet
December 31, 1954
with comparative figures at December 31, 1953

ASSETS	1954	1953
Investments at indicated market (note 1):		
Government obligations (83,000 pledged in 1953)	$ —	$ 1,080,500
Corporate securities, other than Missouri Pacific Railroad Company common stock (cost $13,506,462 in 1954 and $27,580,446 in 1953)—(note 2):		
Pledged	21,207,176	22,006,934
Unpledged	20,046,402	11,127,546
	41,253,578	33,134,480
Missouri Pacific Railroad Company common stock (note 1)—(cost $31,032,312, less reserve of $29,212,007), unpledged	5,544,000	2,574,000
	46,797,578	36,788,980
Investment in joint ventures (note 3):		
50% ownership of securities stated at indicated market quotations in 1954 and at guaranteed cost in 1953 (cost $9,007,813 in 1954):		
Pledged	7,577,000	449,466
Unpledged	4,562,242	2,190,065
	12,139,242	2,639,531
Notes receivable from other participants, secured by pledge of 50% securities	9,007,813	2,637,490
	21,147,055	5,277,021
Total investments	69,944,633	42,066,001
Other assets:		
Cash on deposit and on hand	1,141,017	1,478,302
Cash collateral under bank loan agreements	—	771,689
Temporary cash investments, at cost, plus accretion	—	2,895,409
Notes receivable (substantially all secured)	17,972,906	9,233,457
Dividends receivable	8,960	105,431
Interest income accrued	443,622	117,931
Accounts receivable	955	8,512
	19,567,460	14,610,731
Office furniture and equipment	28,902	—
Deferred expenditures (note 4)	1,409,692	173,300
	$88,950,687	$56,850,032

See accompanying notes to financial statements.

[fol. 317]

LIABILITIES	1954	1953
5% Sinking fund debentures:		
Due November 1, 1962 (note 5)	$ 8,000,000	$ 9,000,000
Less amount held in treasury	540,000	1,128,000
	7,496,000	7,872,000
Notes payable to banks (secured):		
Due March 12, 1955 and May 22, 1954, respectively	800,000	800,000
Due September 16, 1955	8,200,000	8,200,000
Due August 13, 1956	5,000,000	5,000,000
	14,000,000	14,000,000
Total debt	21,496,000	21,872,000
Accounts payable and accrued liabilities:		
Interest on debentures and bank loans	107,365	115,708
Liability for Federal taxes on income (note 6)	34,236	53,279
Others	292,241	151,505
	433,842	320,492
	21,929,842	22,192,492
Capital stock and surplus:		
Capital stock:		
Prior preferred (convertible), no par value (note 8)—authorized 28,367 shares, none outstanding	—	—
$4 prior preferred convertible stock, no par value (note 7)—authorized 28,367 shares, outstanding 25,637 shares at December 31, 1954, stated value $80 per share	2,050,960	2,067,600
Preferred—authorized 1,500,000 shares, $100 par value per share; outstanding 144,544 shares of cumulative 5½% preferred stock, Series A, less 7,800 shares held in treasury (notes 7, 8 and 9)	13,674,400	13,674,400
Common—authorized 12,350,000 shares, par value $1 per share (approximately 2,600,000 shares of which are reserved for conversion and purchase rights)—(notes 7 and 8); outstanding with public 4,641,125 shares at December 31, 1954	4,641,125	4,637,797
	20,366,485	20,379,797
Surplus (notes 5 and 7):		
Paid-in surplus	107,131,944	107,118,632
Earned surplus (deficit), based on indicated market quotations for investments (note 1)	(60,477,584)	(92,840,889)
	46,654,360	14,277,743
	67,020,845	34,657,540
	$88,950,687	$56,850,032

[fol. 318]

ALLEGHANY CORPORATION

Statement of Income
Year ended December 31, 1954
with comparative figures for 1953

	1954	1953
Income (exclusive of security transactions):		
Dividends	$ 702,529	$1,579,665
Interest earned on investments	246,796	238,576
Other interest and miscellaneous	726,790	202,474
Total income	1,676,115	2,020,715
Expenses:		
Interest on debentures and bank loans	881,061	934,050
Amortization of debt expenses	13,434	29,728
Administrative and general expenses	829,098	547,605
Advances and expenses re Missouri Pacific Railroad Company reorganization	57,769	245,110
Total expenses	1,781,362	1,756,493
Income (loss) (exclusive of profit and loss on security transactions) before provisions for Federal taxes on income	(105,247)	264,222
Provision for Federal taxes on income—normal tax and surtax (no excess profits tax payable)	—	20,000
Net income (loss) (exclusive of profit and loss on security transactions) transferred to earned surplus (deficit)	$(105,247)	$244,222
Statement of Profit and Loss on Security Transactions		
Net gain on sales of securities	$3,812,645	$6,452,830
Net gain on joint ventures	466,103	—
Net gain on security transactions transferred to earned surplus (deficit)	$4,278,748	$6,452,830

See accompanying notes to financial statements.

[fol. 319]

ALLEGHANY CORPORATION

Statement of Surplus
Year ended December 31, 1954
with comparative figures for 1953

	1954	1953
Paid-in surplus:		
Balance at beginning of year	$107,118,632	$108,958,755
Stated value of 208 shares of $4 prior preferred convertible stock, less par value of 3,328 shares of common stock into which converted	13,312	—
Excess of consideration received over stated value of 10 shares of prior preferred stock issued in exchange for interest coupons on called bonds	—	400
Excess of net proceeds over par value of common stock (70,000 shares) sold under stock option plan	—	142,297
	107,131,944	109,101,452
Less $70 per share on prior preferred stock, 25,845 shares of which were exchanged in 1953 for $4 prior preferred stock and 2,481 shares called for redemption	—	1,982,820
Balance at end of year	107,131,944	107,118,632
Earned surplus (deficit)—(notes 5 and 7):		
Balance at beginning of year	(99,149,945)	(105,846,997)
Net income (loss) for the year:		
Exclusive of net profit on security transactions	(105,247)	244,222
Net profit on security transactions	4,278,748	6,452,830
	(94,976,444)	(99,149,945)
Deduct dividends declared on $4 prior preferred convertible stock ($4 per share)	103,380	—
	(95,079,824)	(99,149,945)
Excess of indicated market quotations for investments over recorded costs thereof (note 1)	34,602,240	6,309,056
Balance at end of year, based on indicated market quotations for investments	(60,477,584)	(92,840,889)
Total surplus at end of year, based on indicated market quotations for investments	$ 46,654,360	$ 14,277,743

See accompanying notes to financial statements.

[fol. 320] ALLEGHANY CORPORATION

Investments
December 31, 1954

	Number of shares or principal amount	Cost	Indicated market quotations
Corporation securities, other than Missouri Pacific Railroad Company common stock:			
Investors Diversified Services, Inc. voting common stock (pledged 107,150 shares)	355,195	$ 1,312,784	$25,574,040
Lansall Corporation:			
5 year 4½% debentures (subordinated)	$1,000,000	1,000,000	1,000,000*
Class A common stock	5,000	555,000	555,000*
Marshall-Wells Company common stock (pledged 885 shares)	900	252,649	235,800
Missouri Pacific Railroad Company:			
5½% bonds due 5/1/49 (pledged)	$624,000	636,695	775,320
5% bonds due 2/1/65 (pledged)	$40,000	35,958	38,300
General mortgage 4% bonds due 3/1/75 (pledge $1,587,000)	$1,592,000	1,436,542	1,968,110
5% bonds due 3/1/77 (pledged)	$515,000	461,630	491,825
5% bonds due 11/1/78 (pledged)	$13,000	11,576	12,318
5% bonds due 4/1/80 (pledged)	$13,000	11,476	12,350
5% bonds due 2/1/81 (pledged)	$82,000	73,884	78,515
New York Central Railroad Company common stock (pledged 278,700 shares)	286,800	6,918,118	9,607,800
Sara Corporation common stock	150	150	150*
Taylor Oil and Gas Co. common stock (pledged 27,000 shares)	44,100	800,000	904,050
		13,506,462	41,253,578
Missouri Pacific Railroad Company:			
Common stock—cost $31,032,312			
Less reserve 29,212,007	396,000	1,820,305	5,544,000
		15,326,767	46,797,578
Investment in joint ventures:			
Delhi Oil Corporation (pledged 40,000 shares)	147,579	2,035,782	2,213,685
Investors Diversified Services, Inc. Class A (pledged)	20,000	360,000	1,440,000
Lionel Corporation (pledged 22,000 shares)	25,600	619,844	524,800
New York Central Railroad Company (pledged 378,000 shares)	600,000	15,000,000	20,100,000
		18,015,626	24,278,485
Less 50% ownership of other participants		9,007,813	12,139,243
Alleghany Corporation 50% ownership of above detailed securities		9,007,813	12,139,242
Notes receivable from other participants (secured by pledge of their 50% ownership of above detailed securities)		9,007,813	9,007,813
Total Alleghany Corporation investment in joint ventures		18,015,626	21,147,055
Total investments		$33,342,393	$67,944,633

Note: *Cost used in the absence of market quotations.

[fol. 321]

ALLEGHANY CORPORATION

Securities Purchased

Year ended December 31, 1954

	Number of shares or principal amount	Cost
Stocks:		
American Mail Line, Ltd. common	55	$ 6
American-La France-Foamite Corporation common	240	3,254
Delhi Oil Corporation common	103,579	1,035,790
Electric Auto-Lite Company common	25,000	989,015
Grinnell Corporation common	1,150	83,359
Marshall-Wells Co. redemption common	15	3,750
Maryland Drydock Company common	1,300	19,851
New York Central Railroad Company common	886,800	21,918,118
Pittston Company 5½% convertible preferred	90	8,264
United States Envelope Company	1,328	97,391
Bonds:		
Missouri Pacific Railroad Company:		
5½% due 5/1/49	$624,000	$ 636,695
5% due 2/1/65	$40,000	35,958
General mortgage 4% due 3/1/75	$523,000	585,651
5% due 3/1/77	$515,000	461,630
5% due 11/1/78	$13,000	11,576
5% due 4/1/80	$13,000	11,476
5% due 2/1/81	$82,000	73,884
		$25,975,668

ALLEGHANY CORPORATION

Securities Sold
Year ended December 31, 1954

	Number of shares or principal amount	Net proceeds
Stocks:		
American Mail Line, Ltd. common	385,576.1	$ 4,125,664
American-La France-Foamite Corporation common	11,158	200,453
Butler Brothers common	21,550	314,899
The Chesapeake & Ohio Railway Company common	104,854	3,595,119
Clinchfield Coal Corporation common	14,400	432,023
Curtiss-Wright Corporation $2 non-cumulative Class A	56,200	1,505,264
Electric Auto-Lite Company common	25,500	909,011
Grinnell Corporation common	12,042	877,862
Harnischfeger Corporation common	11,020	249,938
Indianapolis Water Company Class A common	52,476	1,203,799
Interlake Steamship Company common	19,827	532,627
Investors Diversified Services, Inc. voting common	45,000½	2,981,297
Maryland Drydock Company common	26,934	482,758
Morrison-Knudsen Company common	7,400	250,108
Pan American Sulphur Company common	20,000	279,466
Pfaudler Company common	8,753	246,728
Pittston Company Common	298,886	6,776,911
Pittston Company 5½% convertible preferred	23,821	2,455,616
Portsmouth Steel Company common	213,467	2,311,741
Snap-On Tools Corporation common	4,796	93,519
Steep Rock Iron Mines, Ltd. common	159,100	951,338
United States Envelope Company common	7,400	606,903
Western Pacific Railroad Company common	15,000	869,841
Government obligations:		
U. S. Treasury 1½% notes	$1,000,000	$ 1,003,281
Township of North York, Province of Ontario, Canada, 4% debentures	$83,000	83,831
		$33,339,997

Alleghany Corporation

Notes to Financial Statements

December 31, 1954

(1) *Basis of Investments:*

The majority of investments are shown at indicated market quotations at the respective balance sheet dates. Alleghany Corporation makes no representation as to such values. The excess of market quotations over book value of the investments held on December 31, 1954, still on hand at March 31, 1955, aggregated approximately $36,013,000. Investments held on December 31, 1954 sold during the period to March 31, 1955 resulted in a loss of approximately $138,000. Book value represents cost (primarily on a first-in, first-out basis), less a reserve of $29,212,007 in the case of the investment in Missouri Pacific Railroad Company, which has been in bankruptcy trusteeship since March 31, 1933.

(2) *Corporate Securities:*

Alleghany Corporation intends to exchange with Murchison Brothers and others, subject to certain conditions, 212,000 shares of voting common stock of Investors Diversified Services, Inc. for a like number of shares of Class A stock (non-voting).

The corporation has received fully transferable options, which it is now entitled to exercise, to purchase 45,000 shares of the common stock of New York Central Railroad Company for a price of $25 per share, 45,000 shares of such stock for a price of $30 per share, and 45,000 shares of such stock for a price of $35 per share. These options expire 183 days after such stock first reaches $5 in excess of the respective option prices. On December 17, 1954 the price reached $30 per share, on January 7, 1955 $35 per share and on April 7, 1955 $40 per share.

(3) *Investment in Joint Ventures:*

The agreements to the various joint ventures provide that each of the two parties is to own a 50% interest and share equally in gains and in one instance, under certain

circumstances, in losses. With one exception the other parties to the agreements have guaranteed that Alleghany Corporation shall be indemnified from loss on its contributions and receive dividends or other income equal to at least 4½% per annum. The corporation has loaned to the other parties its share of the cost on promissory notes secured by the interest of the parties in the ventures and payable upon their termination. Either party has the right to pledge or hypothecate any stocks or other securities owned by the ventures.

(4) *Deferred Expenditures:*

Substantially all of the deferred expenditures represent amounts spent in connection with the solicitation of proxies of the New York Central Railroad Company. These expenditures have been made on behalf of others and it is anticipated that Alleghany Corporation will be reimbursed for them during 1955.

(5) *5% Sinking Fund Debentures:*

The debentures may be redeemed from time to time, in whole or in part, at par plus accrued interest and a premium of 4% to and including November 1, 1955, such premium decreasing thereafter at the rate of ½% per annum until November 1, 1961, after which they may be redeemed at par. Sinking fund provisions require deposit of $1,000,000 with the trustee annually on November 1, through 1961; in lieu of cash, debentures may be deposited with the trustee at par.

The indenture provides that the corporation will not, without written consent of holders of two-thirds of the aggregate principal amount of the debentures at the time outstanding, pay or declare any dividend (except in stock of the corporation); or make any distribution on or redeem, retire, purchase or otherwise acquire, directly or indirectly, any of its stock, unless after giving effect to such payments or distributions, value of the corporation's total assets, less all liabilities other than capital indebtedness, would equal 150% of the corporation's total capital indebtedness, as defined therein.

(6) *Federal Taxes on Income:*

The returns for the years subsequent to 1947 are still open.

Additional assessments have been proposed by the Internal Revenue Service. The provision made in the accounts is believed to be adequate to cover the settlement of any of these assessments that may be imposed.

(7) *Capital Stock:*

(a) The $4 preferred convertible stock is redeemable at and entitled in voluntary and involuntary liquidation to $80 per share, plus accrued dividends. Semiannual dividends on this stock are cumulative and have been paid to October 1, 1954. Each share is convertible into sixteen shares of common stock.

(b) The 5½% preferred stock, Series A, is redeemable at $105 or in involuntary dissolution at $100 plus, in each instance, accrued dividends. The 136,744 shares of Series A preferred stock outstanding with the public at December 31, 1954 had aggregate liquidating value in voluntary dissolution of $14,358,120 and in involuntary dissolution of $13,674,400, plus unpaid dividend accumulations of $17,799,511.

[fols. 323-325] (d) There are outstanding at December 31, 1954, 2,000,000 warrants for the purchase of 2,000,000 shares of common stock at $3.75 per share.

* * * * * * *

[fol. 326] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF RANDOLPH PHILLIPS—Filed February 29, 1956

STATE OF NEW YORK,
County of New York, ss.:

Randolph Phillips, being duly affirmed, deposes and says:

I make this affidavit for the sole purpose of correcting three typographical errors in my supplemental affidavit before this Court, dated June 28, 1955.

1. At page 2 of said affidavit, the fourth sentence should read: "It is not true that Alleghany will become subject to the Investment Company Act only at such time as the S. E. C. affirmatively so desires at the hearing".

2. The last sentence at page 2 of said affidavit should read: "As for Wallace's statement that his sources of information and belief are 'conversations' had by Alleghany counsel on this subject with 'representatives of the S. E. C.', may I point out, etc."

3. At page 7, in "7", fourth line, the word "profits" should be "proceeds".

As the Court will appreciate, the extreme haste in which [fols. 327-329] this paper was dictated and typed resulted in these stenographic errors.

Randolph Phillips.

Affirmed to before me, this 29th day of June, 1955.

Eugene G. King, Notary Public, State of New York, No. 03-7267750, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1956.

[fol. 330] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT

STATE OF NEW YORK,
City of New York,
County of New York, ss.:

Randolph Phillips, being duly affirmed, deposes and says: I submit this affidavit in opposition to the proposed order and judgment submitted for settlement by this Court on behalf of defendant Alleghany Corporation and in support of plaintiffs' proposed order.

I

In addition to the considerations set forth in Mr. Brussel's affidavit, I call this Court's attention to the fact that on December 9, 1955, Alleghany Corporation registered with the Securities and Exchange Commission, pursuant to Section 8(a) of the Investment Company Act.

The registration was *unconditional,* as will be noted from the following excerpt from the testimony given in my presence by David W. Wallace, Secretary of Alleghany Corporation, in the Supreme Court of the State of New York, on December 14, 1955:

"By Mr. Daly:

Q. On the basis of your experience with the Securities and Exchange Commission regulations as a lawyer, Mr. Wallace, can you tell me whether that means [fol. 331] that Alleghany Corporation is now registered as an Investment company with the Securities and Exchange Commission?

A. Yes, that means that Alleghany Corporation is registered as an investment company under the Investment Company Act of 1940, as of December 9, 1955, when we filed our notification of registration.

Q. Subject to the conditions in the letter of December 9, 1955?

A. No, it is not subject to those conditions in the

sense that the registration was final regardless of conditions.

"The conditions were merely our way of telling the S. E. C. that we were not in any way reversing our field or our stand regarding these other items.

"But the notification—and I made this clear in conversations with the S. E. C. on Friday—the notification of registration is filed unconditionally, and Alleghany has registered itself under the Investment Company Act of 1940."

Mr. Hartfield's affidavit was sworn to on December 9, 1955, but it omitted to inform the Court of the above unconditional registration. I submit that the fact of this registration invalidates Mr. Hartfield's arguments for eliminating the specific injunctive relief proposed by plaintiffs' final order and judgment.

By this unconditional act, Alleghany has in effect admitted that it was an unregistered investment company prior to December 9, 1955 and was subject to the Investment Company Act since at least May 24, 1955, the latest alternative terminal date of the I. C. C.'s jurisdiction, under the final opinion of this Court.

The issuance of the new preferred stock and the acquisition of the old stock by Alleghany in exchange therefor, were acts outlawed by Section 7(a) of the Investment Company Act.

[fol. 332] II

Mr. Hartfield's affidavit refers to the order of Mr. Justice Harlan, which maintained this Court's preliminary injunction with respect to approximately 400,000 shares of the new 6% Convertible preferred stock, but released, for purposes of trading and transfer, the remaining 900,000 shares.

Mr. Hartfield failed to inform the Court that this release has proved to be almost barren of results because despite that order, the New York Stock Exchange refused to permit trading in the 900,000 shares. Thus, with some possible exceptions not disclosed by Mr. Hartfield, the new preferred stock is frozen in the hands of the original own-

ers, either by the injunction or as a matter of practical result.

III

The Corporation proposes in an indirect way to attempt to get this Court to legalize the merger of the Louisville and Jeffersonville Bridge Company into the Big Four, by including in the judgment, a provision suggesting that this Court has reviewed the merits of the merger. Of course, this Court did no such thing. Alleghany Corporation now has openly admitted in proceedings in the Supreme Court of the State of New York *that at no time did its directors authorize Alleghany to acquire control of New York Central. In fact, they rejected such control by the Corporation in favor of its being taken individually by Young and Kirby.*

[fol. 333] I attach hereafter, as Exhibit "A" to this affidavit, a photostat of a certified copy of a true excerpt from the Minutes of a Meeting of Alleghany's Board of Directors, held on January 19, 1954. It may be seen therefrom that Mr. Young therein stated "his personal opinion that substantial investment by this Corporation in Central at this time was not wise because it was not yet clear whether control could be obtained *and because control could perhaps be more easily secured by individuals than by a corporation.* * * * He added, however, that if the Board thought otherwise he and Mr. Kirby were willing to offer their shares of Central to the Corporation at cost or market, whichever was lower." (Emphasis supplied)

Exhibit "A" shows that the Board declined the offer and agreed with the views of Mr. Young.

At no time thereafter was any resolution passed by the Board authorizing Alleghany to acquire control of the New York Central Railroad Company, nor was any resolution passed authorizing any person to nominate any Alleghany representative to the Board of New York Central Railroad or to solicit on behalf of Alleghany, proxies for the election of any person to the Board of the Railroad. For this statement, I rely on Exhibit "B" hereto annexed, which is an excerpt from the Stenographer's Minutes of the testimony of Mr. Wallace, Alleghany's Secre-

tary, taken in my presence in the Supreme Court of the State of New York, on November 23, 1955.

I submit that Alleghany and its counsel have not dealt fairly with this Court and with the Interstate Commerce Commission in representing to both bodies that Alleghany acquired control of the New York Central Railroad Company as a result of the 1954 Proxy Contest, knowing full [fol. 334] well that the records of the proceedings before Alleghany's Board, as shown in Exhibit "A", showed a rejection of such a proposed acquisition of control by the Corporation, and instead, an endorsement of Mr. Young's views that the control should be secured "by individuals (rather) than by a corporation". At no time has this policy been changed, as reflected by the Board's Minutes and Mr. Wallace's testimony attached hereinafter as Exhibit "B".

IV

I believe it essential that this Court make clear that on January 19, 1954, Alleghany became subject to the Investment Company Act of 1940. This is important because counsel for Messrs. Young and Kirby, in the State Court proceedings relating to derivative actions against said persons informed the Referee on November 23, 1955, that the final opinion of this Court, in his judgment, "destroys, completely, the so-called Investment Company causes of action alleged in the complaint herein. * * * The whole purchase of 800,000 shares is certainly out the window, because the purchase was made prior to May of 1954." Counsel relies for this statement on footnote 7(a) of this Court's final opinion, which states merely that on May 21, 1954, Alleghany ceased to control even one carrier, since Pittston Company was divested on this date.

From this footnote, used illustratively and alternatively to indicate the weakness of all of Alleghany's arguments advanced at the final hearing, Alleghany's counsel in the derivative action now is claiming that this Court has found that the Investment Company Act did not apply until May 21, 1954 and that the I. C. C.'s jurisdiction continued to [fol. 335] attach until that date because of the ownership of Pittston stock.

Implicit in the earlier proceedings of this Court (opinion

on motion for preliminary injunction, 134 Fed. Supp. 132 at page 142) that Alleghany divested itself of control of C. & O. on January 19, 1954 is the holding (based on the then conceded fact that Alleghany controlled no carrier after that date), that the I. C. C. lost jurisdiction on that date. Not once in the record before the I. C. C. did Alleghany suggest that its jural relationship to the Pittston Company gave it carrier status between January 19, 1954 and May 21, 1954.

At sheets 9 and 10 of the report of the full Commission in Finance Docket #18656, dated May 24, 1955, the following appears:

> "The record shows that on or about January 19, 1954, Alleghany divested itself of its remaining stock of the Chesapeake system, and no longer controlled or had the power to control any carrier subject to the act . . .
>
> "In view of the above stated divestiture by Alleghany of the stock of carriers subject to the Act, we conclude that at the time of its acquisition of control of Central on May 26, 1954, it was in fact 'a person not a carrier' as that phrase is used in Section 5(2) of the Act."

Footnote 7(a) of the final opinion is being misused by Alleghany and its counsel. The footnote ignores the holding in 261 I. C. C. 239 that the stock of the Pittston Company was placed in a voting trust before January 19, 1954 (the trust was created in 1945) and nothing in the record before this Court suggests that the trust was ever terminated prior to the sale of the Pittston Stock by Alleghany on May 21, 1954.

[fol. 336] But even if Alleghany controlled Pittston from January 19, 1954 through May 21, 1954, the control of that single carrier does not qualify Alleghany under Clause IV or V of Section 5(2)(a)(i).

In order to eliminate any unnecessary confusion by the Referee, or any other persons who may rely on footnote 7(a) and the sentence in the opinion to which the footnote relates, I ask this Court to make it clear that it did not

find or intend to find that Alleghany controlled any carrier after January 19, 1954.

Randolph Phillips.

Affirmed before me this 21 day of December, 1955.
Eugene G. King, Notary Public, State of New York, No. 03-7267750, Qualified in Bronx County, Certificate filed in New York County, Commission Expires March 30, 1956.

[fol. 337] EXHIBIT A TO AFFIDAVIT

Certificate

I, the undersigned, David W. Wallace, Secretary of Alleghany Corporation, a Maryland corporation, do hereby certify as follows:

1. A meeting of the Board of Directors of Alleghany Corporation was held on January 19, 1954, (hereinafter called "the meeting").

2. Messrs. J. J. Anzalone, O. Henry Briggs, Henry J. Guild, Herman R. Neff, Andrew Van Pelt, and Robert R. Young constituting a quorum of the Board of Directors were present at the meeting.

3. The following is a true excerpt from the minutes of the meeting:

> The Chairman stated that he wished the Board to consider the advisability of selling the Corporation's remaining 104,854 shares of The Chesapeake and Ohio Railway Company Common stock to Cyrus S. Eaton, who as the largest stockholder of C. & O., had suggested such sale to him at approximately market. He cited the continuing dim prospect, in his opinion, for the coal industry on which the Chesapeake and Ohio traditionally relies and the fact that, with the sale of C. & O., this Corporation would be in a position to look toward a substantial interest in the attractive New York Central Railroad Company. He pointed out that the possibility of sale to the C. & O. itself and to its

management had been investigated but that neither was in a position to be interested. He added that a sale to Mr. Eaton would appear to be in the interests of other C. & O. stockholders inasmuch as Mr. Eaton had always been a progressive in financial and railroad matters. He stated that he and Mr. Kirby had recently acquired substantial blocks of New York Central shares and had submitted requests for two places on the Board with Mr. Young to be Chairman. The Chairman stated his personal opinion that substantial investment by this Corporation in Central at this time was not wise because it was not yet clear whether control could be obtained and because control could perhaps be more easily secured by individuals than by a corporation. He added, however, that if the Board thought otherwise, he and Mr. Kirby were willing to offer their shares of Central to the Corporation at cost or market, whichever was lower. A full discussion ensued, after which the directors of Alleghany Corporation who are also directors of the Chesapeake and Ohio Railway Company concluded to relinquish their directorships on the Chesapeake and Ohio Board; and upon motion duly made, seconded and unanimously carried, with the Chairman not voting, it was

Resolved, that the offer of Messrs. Young and Kirby to sell all of their holdings of New York Central Railroad Company common stock to this Corporation at their cost or market, whichever is lower, is declined inasmuch as this Board is of the opinion that it is in the best interests of this Corporation at this time for Messrs. Young and Kirby to seek representation in the New York Central Railroad Company; and be it further

[fol. 338] Resolved, that the Chairman of the Board, or the President or any Vice President, or the Treasurer, or such other person or persons he or they may designate for the purpose be and each of them hereby is authorized for and on behalf of the Corporation to purchase from time to time up to 100,000 shares of New York Central Railroad Company Common stock at prices within the discretion of the above named offi-

cers; to execute and deliver for and on behalf of this Corporation any and all instruments in writing and to do any and all other things in his (or their) judgment necessary or desirable in order to effectuate the intent and purpose of this resolution; and be it further

Resolved, that the Chairman of the Board, or the President or any Vice President, or the Treasurer of the Corporation be and he hereby is (or they hereby are) authorized to sell for and on behalf of the Corporation to Cyrus S. Eaton 104,854 shares of The Chesapeake and Ohio Railway Company Common stock at $34⅝ per share, less commission; to execute and deliver on behalf of the Corporation any and all stock powers and other instruments in writing and to do any and all things in his (or their) judgment necessary or desirable in order to make such sale and in order to effectuate the intent and purposes of this resolution.

In Witness Whereof, I have executed this certificate and affixed the seal of the Corporation this 15th day of September, 1955.

David W. Wallace, Secretary.

(Seal)

State of New York,
County of New York, ss.:

On this 15th day of September, 1955, in the said County of New York, before me, a Notary Public duly commissioned and qualified, in and for the State and County aforesaid, personally came David W. Wallace, personally known to me, and known to me to be the person described in and who executed the foregoing certificate, and acknowledged to me that he executed the same; and being by me duly sworn, did depose and say that he is the Secretary of the Board of Directors of the Alleghany Corporation; that as such officer he keeps the corporate minute books and seal of the said Corporation; and that the foregoing certificate truly sets forth the matters referred to therein as they appear in the minute books of the Corporation.

Subscribed and sworn to before me this 15th day of September, 1955.

Florence V. Kenny, Notary Public, State of New York, No. 24-7236200, Qualified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1956.

(Notarial Seal)

[fol. 339] EXHIBIT B TO AFFIDAVIT

Pages 2097-2099 of Stenographic Minutes in the Supreme Court of the State of New York, County of New York, in Sadie Zenn, et al., Plaintiffs, v. Anzalone, et al., Defendants, Index No. 7244/1954, before Hon. Robert J. Fitzsimmons, Referee, Testimony of David W. Wallace, November 23, 1955.

"Cross-examination (Continued)

By Mr. Graubard:

Q. Mr. Wallace, is there any minute by Alleghany's directors authorizing the officers to take steps to acquire control of New York Central Railroad?

A. Only on an approval of the April 8, 1954 proxy statement by the board of director of Alleghany Corporation; otherwise, no.

Q. Was there no resolution prior to that approval of the proxy statement?

A. There were resolutions approving the purchase of central stock.

Q. Are you referring to the January 19, 1954, minute in regard to the purchase of stock?

A. Yes; I believe that is the minute I have reference to.

Q. Was there any other minute authorizing the purchase of stock of New York Central Railroad?

A. When?

Q. During 1954.

A. I think in the latter part of 1954 there was; yes, sir.

[fol. 340] Q. Can you tell us which minute that was.

A. I will have to check and see. It would be in the form of authorization of purchases, that is all.

Q. Is there any reference in the minutes of either the executive committee or of the board of directors of Alleghany Corporation pertaining to the acquisition of control, voting control, of New York Central by Alleghany Corporation?

Mr. Daly: Any minutes that discussed that subject?

Mr. Graubard: That is right, sir.

A. Other than January 19, 1954?

Q. That is right.

A. And other than that approval of the proxy statement?

Q. That is right.

A. No, sir.

Q. Have you produced the resolution today, the approval of that proxy statement, or is it otherwise in the record?

The Referee: He says it is in the minute.

Mr. Graubard: But is it in the record of this hearing, sir?

The Referee: Off the record.

(Discussion off the record).

[fol. 341] A. I would like to correct my testimony. My recollection is wrong. That minute only pertained to the method of handling the payment of the costs on the proxy fight, not the approval of the proxy statement."

The following is extracted from pages 33 06-07:

"Mr. Daly: I offer in evidence a single sheet, being a certified copy of a resolution of a meeting of the board of directors of Alleghany Corporation, held on June 15, 1954. This concerns itself with the proxy expenses * * *

"The Referee: It will be received in evidence and marked Defendant's Exhibit 420."

Exhibit 420 in pertinent part reads:

"Resolved, that the action of certain officers of this Corporation in advancing funds of this Corporation

and furnishing aid to the Alleghany-Young-Kirby nominees in the recent proxy contest of the New York Central Railroad Company, as set forth in a proxy statement of such nominees dated April 8, 1954, a copy of which is attached hereto as Schedule B, be and it is hereby approved and ratified in each and every respect."

[fol. 342] BEFORE THE INTERSTATE COMMERCE COMMISSION

ORDER RE CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC., F. D. No. 14692

and

ALLEGHANY CORPORATION CONTROL, No. 29085—Dated June 5, 1945

Investigation of the matters and things involved in these proceedings having been made, hearings having been held, and said Division having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That purchase by The Chesapeake and Ohio Railway Company of the properties of the Norfolk Terminal & Transportation Company, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized: *Provided, however*, and this authorization and approval are granted upon the express condition, that before recording the acquisition of said properties in its books said Chesapeake and Ohio Railway Company shall first submit the related journal entries for approval by this Commission.

It is further ordered, That The Chesapeake and Ohio Railway Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

It is further ordered, That, for the purpose set forth in the application and aforesaid report, The Chesapeake and

Ohio Railway Company be, and it is hereby, authorized to assume obligation and liability, as primary obligor, in respect of not exceeding $500,000 of Norfolk Terminal & Transportation Company first mortgage five percent bonds; and that, within 10 days after the execution of the supplemental indenture whereby said obligation and liability is assumed, a certified copy thereof shall be filed with this Commission by The Chesapeake and Ohio Railway Company.

It is further ordered, That The Chesapeake and Ohio Railway Company shall report concerning the matters involved in the foregoing paragraph of this order in conformity with the order of the Commission, by Division 4, dated February 19, 1927, respecting applications filed under Section 20a of the Interstate Commerce Act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said bonds, or interest thereon, on the part of the United States.

[fol. 343] *It is further ordered*, That acquisition by the Alleghany Corporation of control, through ownership of stock, of The Chesapeake and Ohio Railway Company, The New York, Chicago and St. Louis Railroad Company, and the Pere Marquette Railway Company, and their subsidiaries and affiliates, be, and it is hereby, approved and authorized: *Provided, however*, that this authorization and approval are granted subject to the express conditions numbered (1), (2), and (3), relative to the depositing of stocks with independent voting trustees and to the elimination of interlocking directors, set forth in said report.

It is further ordered, That the trust agreements in the form submitted with the Alleghany Corporation's petition filed April 13, 1945, and the trustees nominated therein be, and they are hereby, approved.

It is further ordered, That within 10 days after execution of said trust agreements, said Alleghany Corporation and said The Chesapeake and Ohio Railway Company shall file with this Commission verified copies of said agreements in the form in which they were executed.

It is further ordered, That the Alleghany Corporation shall report to this Commission quarterly beginning with

July 1, 1945, any changes in matters covered by said trust agreements.

It is further ordered, That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act to the same extent that those provisions are applicable to The Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates; *Provided*, that as to the applicability of said provisions of Section 20 and Section 20a to said Alleghany Corporation this order shall take effect and be in force on and after the date hereof, except that as to the provisions of Section 20 pertaining to annual reports, it shall be deemed effective as of January 1, 1945.

And it is further ordered, That the proceeding in No. 29085, *In Re Alleghany Corporation Control*, be, and it is hereby, discontinued.

By the Commission, Division 4.

W. P. Bartel, Secretary.

[fol. 344] IN THE MATTER OF ALLEGHANY CORPORATION

File No. 811-338

Investment Company Act of 1940—Sections 3 (c) (9) and 8 (f)

ORDER RE REGISTRATION OF ALLEGHANY CORPORATION—October 4, 1945

Alleghany Corporation, a registered investment company, having filed an application pursuant to Section 8 (f) of the Investment Company Act of 1940 for an order declaring that it has ceased to be an investment company within the meaning of said Act;

A public hearing having been duly held, after appropriate notice, and the Commission having this day issued its Findings and Opinion in the matter;

It is hereby declared that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940; and

It is ordered that the registration of Alleghany Corporation under the Investment Company Act of 1940 shall forthwith cease to be in effect, *provided, however,* that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act, as set forth in such Findings and Opinion, this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing.

By the Commission.

Orval L. DuBois, Secretary.

[fol. 345] INTERSTATE COMMERCE COMMISSION
Washington 25

Office of the Chairman

February 5, 1954.

Hon. Burton K. Wheeler,
Wheeler & Wheeler,
Southern Building,
Fifteenth and H Streets, N.W.,
Washington 5, D. C.

Dear Senator Wheeler:

This will acknowledge the receipt of your letter of January 28th, referring to the report and order in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase,* decided June 5, 1945, 261 I.C.C. 239, wherein, among other things, the Alleghany Corporation was authorized to acquire control of the Chesapeake & Ohio Railway Company and its subsidiary and affiliated carriers, subject to three conditions set forth on page 22 of the mimeographed report, and on page 262 of the printed report.

You now state that Alleghany divested itself of control of the Chesapeake & Ohio on January 19, 1954, by the sale of its Chesapeake & Ohio stock to Mr. Cyrus Eaton, and by the resignation from the Board of Directors of Chesapeake & Ohio of Mr. Robert R. Young, Chairman, and Allan P. Kirby, President of the Alleghany board, and the resig-

nations of four other members of the Chesapeake & Ohio board; that five of the six vacancies on the Chesapeake & Ohio board have been filled; and that Mr. Eaton was elected Chairman of the board.

It is noted that, in view of your conclusion that the Alleghany no longer exercises control of the Chesapeake & Ohio and its subsidiaries, you have advised Alleghany and Messrs. Young and Kirby that the three conditions mentioned are no longer applicable to them; that Alleghany is therefore free to acquire stock ownership in or control of another carrier; and that Messrs. Young and Kirby and other officers and directors of the Alleghany are free to accept or seek directorships of another carrier.

It is also noted that in view of your conclusion that the above-mentioned order did not purport to prescribe absolute requirements which would be binding upon Alleghany, its officers and directors, at all times thenceforth, entirely apart from its control of Chesapeake and Ohio, you are of the opinion that conditions surrounding the authorization of Alleghany to control the Chesapeake and Ohio depended upon continuance of such control; that those conditions [fol. 346] were coextensive in time with such control and did not endure after Alleghany ceased to exercise the authority granted it by the order; and that it is self-evident that once Alleghany and Messrs. Young and Kirby ceased to exercise the control thus granted, they were no longer required to conform to those conditions.

Since no proceeding involving the matters discussed in your letter is pending before the Commission, you understand, of course, that the Commission is not in position to pass upon them, and that failure of the Commission to express an opinion as to those matters is not to be construed as a concurrence in your opinion. If the Alleghany desires any expression of opinion by the Commission, it should file a petition in Finance Docket No. 14692, submitting for its consideration such matters as the Alleghany deems appropriate.

In this connection, your attention is invited to the following provision in the Commission's order:

> *It is further ordered*, That unless and until otherwise ordered by this Commission, said Alleghany Cor-

poration shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act, to the same extent that those provisions are applicable to The Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates.

With kind personal regards,

Cordially, (S.) J. M. Johnson, Chairman.

[fol. 347] BEFORE THE INTERSTATE COMMERCE COMMISSION, DIVISION 4

ORDER RE CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.—Dated July 23, 1954

It appearing, That on June 5, 1945, the Commission, by division 4, issued its report and order in the above-entitled proceeding approving and authorizing, among other things, subject to certain express conditions, the acquisition by Alleghany Corporation of control, through ownership of stock of The Chesapeake and Ohio Railway Company, and its carrier subsidiaries and affiliates; and provided that unless otherwise ordered by this Commission, the Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, to the same extent that those provisions are applicable to The Chesapeake and Ohio Railway Company and its carrier subsidiaries and affiliates;

It further appearing, That this Commission has been advised by counsel representing the respective companies, that Alleghany Corporation and its affiliates have divested themselves of control of The Chesapeake and Ohio Railway Company and its related carriers, and to that extent had ceased exercising the authority granted by the said order of June 5, 1945;

It further appearing, That on June 22, 1954, the Commission, by division 4, ordered Alleghany Corporation to

show cause on or before July 15, 1954, why the said order of June 5, 1945, so far as it applies to Alleghany Corporation, should not be vacated and set aside and be no longer of any force and effect, and the Alleghany Corporation no longer be considered a carrier for the purposes of the aforesaid subsections of sections 20 and 20a of the act;

It further appearing, That Alleghany Corporation, on June 29, 1954, responded to the order to show cause, agreeing to the entry of an order forthwith formally terminating the authority granted Alleghany Corporation to control The Chesapeake and Ohio Railway Company, but, requesting an extension to October 1, 1954, of the time to respond to the said order of June 22, 1954, so far as it declared that it appeared Alleghany Corporation should no longer be considered a carrier subject to certain provisions of the act; and the Commission, by division 4, on July 1, 1954, denied the said request to extend the time within which to respond to the said order of June 22, 1954.

It further appearing, That on July 14, 1954, Alleghany Corporation filed its further response to the order to show cause, stating that it has no objection to the entry of an order at a proper time terminating its authority to control The Chesapeake and Ohio Railway Company and requesting the Commission to withhold action thereon pending the filing by the New York Central Railroad Company and Alleghany Corporation, as the companies presently controlling The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, of an application with the last named railway, under section 5(2) of the act, to acquire operating control by lease and/or acquisition of the properties, franchises, privileges, and appurtenances of the Louisville & [fol. 348] Jefferson Bridge and Railroad Company, a carrier operating in interstate commerce, which the respondent contends, when approved and authorized, would require that Alleghany Corporation be considered as a carrier subject to the aforesaid provisions of the Interstate Commerce Act; and requesting further that, if the Commission is unable to withhold action as requested, oral argument be granted on or after October 1, 1954;

It is ordered, That action be withheld for 60 days from the date hereof on the said show cause order of June 22,

1954, in order to permit the filing of the application described in the preceding paragraph hereof.

By the Commission, division 4.

George W. Laird, Secretary.

[fol. 349] BEFORE THE INTERSTATE COMMERCE COMMISSION

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILROAD COMPANY, et al.

Finance Docket No. 18656

PETITION FOR LEAVE TO INTERVENE—September 24, 1954.

Comes now your petitioner, the Securities and Exchange Commission, and respectfully represents that it has an interest in certain of the matters in controversy in the above-entitled proceeding as indicated below and desires to intervene in said proceeding for the limited purpose set forth below, and for grounds of the proposed intervention states:

I. The Securities and Exchange Commission, an agency of the United States Government, is charged with regulatory responsibilities in respect of investment companies, pursuant to the provisions of the Investment Company Act of 1940.

II. Alleghany Corporation, one of the applicants in this proceeding, by order of the Securities and Exchange Commission dated October 4, 1945, has been found to be excepted from the definition of an investment company contained in the Investment Company Act of 1940, pursuant to the provisions of Section 3(c)(9) thereof, as a company subject to regulation under the Interstate Commerce Act.

III. Said order of the Securities and Exchange Commission dated October 4, 1945, was based upon an order of the Interstate Commerce Commission in Finance Docket No. 14,692, dated June 5, 1945, declaring Alleghany Corporation to be deemed a "carrier" subject to certain provisions of the Interstate Commerce Act.

IV. The application in this proceeding contains a request, among others, that the Interstate Commerce Commission enter an order herein containing the condition that [fol. 350] Alleghany Corporation shall continue to be considered a "carrier" subject to certain provisions of the Interstate Commerce Act.

V. The Securities and Exchange Commission believes that the overall legislative policy expressed by the Congress of the United States in the Investment Company Act of 1940 and the Interstate Commerce Act will best be carried out by revocation of the order of the Interstate Commerce Commission in said Finance Docket No. 14,692 dated June 5, 1945, and that Alleghany Corporation should not continue to be considered a "carrier," as more fully discussed in the Memorandum of the Securities and Exchange Commission dated September 14, 1954, heretofore submitted to the Interstate Commerce Commission.

Wherefore the Securities and Exchange Commission prays leave to intervene in this proceeding for the limited purpose of filing herein its said Memorandum dated September 14, 1954.

Securities and Exchange Commission, By (S.) William H. Timbers, General Counsel.

Dated at Washington, D. C., September 24, 1954.

[fol. 351] *Duly sworn to by Myron S. Isaacs, jurat omitted in printing.*

[fol. 352] BEFORE THE INTERSTATE COMMERCE COMMISSION
Washington, D. C.

CHESAPEAKE & OHIO RAILWAY COMPANY, PURCHASE ETC.
Finance Docket No. 14692

MEMORANDUM OF SECURITIES AND EXCHANGE COMMISSION—
September 14, 1954

The Securities and Exchange Commission submits this Memorandum to the Interstate Commerce Commission for the following purposes: (1) to outline the history of

the regulation of Alleghany Corporation, which was a registered investment company subject to the Investment Company Act of 1940 prior to October 4, 1945 and which thereafter was subject to regulation as a "carrier" under the Interstate Commerce Act by reason of its control of the Chesapeake & Ohio Railway Company; at that time Alleghany had approximately 86% of its assets concentrated in the securities of carriers; (2) to point out that since 1945 the basis for regulation of Alleghany under the Interstate Commerce Act has changed as a result of the disposal of the last of Alleghany's interest in the C & O in January, 1954, its recent acquisition of alleged control of the New York Central Railroad Company and the gradual reversal since 1945 of its investment position in carriers with the result that, according to the July 31, 1954 figures it then had only about 16% of its total assets invested in carriers and 72% invested in non-carriers; (3) to point out that since the disposal of its interest in the C & O, Alleghany has engaged in transactions which under the Investment Company Act would have required the approval or exemption by the SEC, assuming, of course, that the Investment Company Act was applicable; (4) to point out that since 1945 Alleghany has engaged in certain trans- [fol. 353] actions described herein which would have been subject to regulation under the Investment Company Act but which were not subject to regulation under the Interstate Commerce Act and which may have been contrary to the best interests of public investors in Alleghany; and (5) to make known to the ICC that the SEC is prepared to assume its regulatory responsibilities with respect to Alleghany under the Investment Company Act and to suggest respectfully that the ICC terminate its order of June 5, 1945 declaring Alleghany to be a carrier subject to certain provisions of the Interstate Commerce Act and to suggest further that the ICC, in the exercise of its discretion, decline to enter any new order declaring Alleghany to be a carrier subject to certain provisions of the Interstate Commerce Act.

There is presently pending before the ICC a proceeding to determine whether the ICC's 1945 order should be terminated. As the SEC understands it the outcome of

this proceeding will depend upon whether the ICC finds that Alleghany is still to be deemed a "carrier" pursuant to Section 5(3) of the Interstate Commerce Act. Alleghany in its "Response" filed with the ICC on July 14, 1954 admits that the factual basis for the ICC's 1945 order has ceased, but requests that the ICC withhold action on the status of Alleghany until Alleghany shall have initiated a new proceeding raising this same issue.

On July 7, 1954 the SEC initiated a parallel proceeding designed, among other things, to prevent a regulatory gap, and scheduled hearings thereon which have since been postponed at Alleghany's request to October 19, 1954, to determine whether it should revoke, modify or suspend its order of October 4, 1945 terminating Alleghany's registration under the Investment Company Act which was made upon the finding that Alleghany was "subject to regulation under the Interstate Commerce Act."

[fol. 354] 1. *Background.*

During the 1930's, Alleghany and its related corporation, Chesapeake Corporation, exercised working control over 22,821 miles of railroad trackage or 9.1% of all steam railroads in the United States, being the largest single railroad group in the country on a mileage basis. At the time of the passage of the Investment Company Act, although the holding-investment company system of which Alleghany was a part was in a state of flux, by and large this control situation still existed.[1]

On November 1, 1940 Alleghany filed a notification of registration under the Investment Company Act as a closed-end, non-diversified management investment company. At the 1940 year-end Alleghany's total assets, taking investments at then current market values of $87,200,000, amounted to $96,553,000, of which over 95% consisted of investments in railroads and allied securities, including an investment in C & O with a then market value of $80,000,000.

By order dated June 5, 1945, the ICC approved the control by Alleghany of the C & O, which in turn controlled

[1] House Document No. 246, 77th Cong., pp. 113 *et seq.*

The New York, Chicago & St. Louis Railroad Company and Pere Marquette Railway Company, and ordered, among other things, that Alleghany be considered as a carrier, subject to certain provisions of the Interstate Commerce Act.

In proceedings initiated by Alleghany, the SEC, on October 4, 1945,[2] on the basis of the June 5, 1945 order of the ICC and an examination of the provisions of the Interstate Commerce Act which were declared to be applicable [fol. 355] to Alleghany, found that Alleghany was "subject to regulation under the Interstate Commerce Act", and was therefore, by virtue of Section 3(c)(9) of the Investment Company Act, excepted from the definition of an investment company. Accordingly, the SEC ordered that the registration of Alleghany under the Investment Company Act "shall forthwith cease to be in effect, provided, however, that if in the future Alleghany Corporation ceased to be subject to regulation under the Interstate Commerce Act as set forth in such Findings and Opinion, this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing."

2. *Alleghany's investment portfolio has changed to such an extent that it should no longer be deemed a "carrier" subject to regulation under the Interstate Commerce Act.*

As already noted, approximately 95% of Alleghany's assets were concentrated in railroad and allied securities, consisting largely of an investment in C & O, at the time Alleghany filed its notification of registration under the Investment Company Act toward the end of 1940. In 1945, immediately before the SEC entered its October 4, 1945 finding that Alleghany was excepted from the definition of "investment company," 86% of Alleghany's assets of $83,000,000 were invested in carriers, including 38% in C & O, and only about 5% in the securities of other companies. The investment in C & O in 1945 consisted of about 600,000 shares of C & O's common stock and gave

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[2] 20 SEC 731.

Alleghany control of C & O. This was the basis for the ICC order of June 5, 1945, which subjected Alleghany to regulation as a carrier under the Interstate Commerce Act.

The situation has now practically reversed itself. The July 31, 1954 financial statements of Alleghany reflect the sale by it of its remaining holdings of 104,854 shares of the C & O stock for about $3,600,000 and the investment of [fol. 356] $7,500,000 in the common stock of New York Central and in notes receivable of $7,500,000 representing loans made in connection with so-called "joint venture agreements" covering additional shares of New York Central common stock. These financial statements thus disclose that only about 16% of Alleghany's assets of $67,000,000 are concentrated in railroad securities represented in large part by its investment in common stock of New York Central (10% of Alleghany's assets), which it now alleges it controls,[1] and the remainder of its assets are comprised of securities of 14 different companies engaged in a wide variety of non-carrier businesses (39%), notes receivable of various obligors most of which represent loans made to persons participating in various joint ventures with Alleghany (aggregating 33% of which 11% represents notes of Murchison Brothers and Sid Richardson[2] secured by New York Central common stock) and cash (12%).

Alleghany's largest single investment at July 31, 1954 comprising 24% of its assets, was in the stocks of Investors Diversified Services, Inc. ("IDS"), a registered face-amount certificate investment company. According to Alleghany's balance sheet as at July 31, 1954, these stocks then had a market value of about $16,000,000 and represented approximately 70% of the voting power of IDS. IDS manages a system of 8 investment companies including itself, which has combined assets exceeding $1,000,000,000 and more than 500,000 security holders. IDS is de-

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[1] See "Response" filed by Alleghany on July 14, 1954 in these proceedings.

[2] For the identity of Murchison Brothers and Richardson see pages 7-8.

scribed by Alleghany as "an investment company controlling or managing one of the world's largest groups of investment companies."

[fol. 357] The total assets of IDS, itself, amount to approximately $257,000,000 most of which is a reserve against outstanding face-amount certificates which were sold prior to enactment of the Investment Company Act. No such certificates have been issued since 1940. IDS owns all the stocks of 3 face-amount certificate companies having combined assets of approximately $376,000,000 and sponsors four open-end investment companies having combined assets of approximately $693,000,000. One of these open-end companies is the largest open-end investment company in the world. IDS is the manager and principal underwriter for these companies and services their real estate and mortgage investments. IDS has a nation-wide sales force of more than 2,000 persons, and is the only large investment company registered under the Investment Company Act which maintains such a sales force. During the recent New York Central proxy contest, the Alleghany-Young-Kirby group announced a plan for the use of the IDS sales force for soliciting proxies in favor of the group's slate of directors. The plan was abandoned following a conference between the SEC and representatives of Alleghany and IDS, at which there was raised a question as to whether such use of the sales force of IDS without adequate compensation might involve a violation of the Investment Company Act by the officers, directors and controlling stockholders of IDS.

The liquidation of Alleghany's interest in C & O, which has occurred gradually since 1945, and was completed by disposal of the remaining 104,854 shares in January 1954, would appear to remove the basis for the ICC's order of June 5, 1945. This change, together with the reversal [fol. 358] since that time of Alleghany's investment portfolio from railroads to non-railroads and despite the alleged control by Alleghany of New York Central, seems to the SEC to indicate that Alleghany is presently an "investment company," and should no longer be exempt from the Investment Company Act by reason of "carrier" status under the Interstate Commerce Act.

3. *Since the disposal of Alleghany's interest in C & O Alleghany has engaged in transactions which would have been subject to regulation under the Investment Company Act assuming the applicability of that Act.*

The last of Alleghany's interest in the C & O was sold to Cyrus S. Eaton on or about January 18, 1954. Inasmuch as Mr. Eaton is chairman and president of Portsmouth Steel Corporation, 18% of whose voting securities are owned by Alleghany, this was a sale by Alleghany to an "affiliated person" of an "affiliated person" of an investment company as defined in the Investment Company Act. Assuming the applicability of that Act, the transaction was not carried out in conformity with Section 17 because it was not exempted by the SEC.[1]

Subsequent to January 1954, Alleghany has engaged in transactions, as described below, with Clint W. Murchison, or a partnership called Murchison Brothers which consists of John D. Murchison and Clint W. Murchison, Jr., sons of Clint W. Murchison, and with Sid Richardson. These transactions were not exempted by the SEC, and, therefore, [fol. 359] they were not carried out in conformity with Section 17[1] of the Investment Company Act, assuming that Act was applicable. On July 15, 1954 Clint W. Murchison and Sid Richardson sold to Alleghany an aggregate of 300,000 shares of New York Central for $7,500,000. In connection with the sale, separate joint venture agreements were entered into between Alleghany and Murchison Brothers and between Alleghany and Richardson, in which Murchison Brothers and Richardson each borrowed from Alleghany the sum of $3,750,000. Sid Richardson and Clint W. Murchison are directors and therefore affiliated persons of the New York Central. Alleghany alleges in its Response filed with the ICC on July 14, 1954, Finance Docket No. 14692, that it controls the New York Central. Such control would make the New York Central an "affiliated

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[1] Section 17 is quoted in pertinent part commencing on page 10 of this memorandum.

person" of Alleghany. Murchison Brothers is an "affiliated person" of IDS by virtue of its ownership of approximately 20% of the voting securities of IDS. IDS, in turn, is an "affiliated person" of Alleghany by reason of Alleghany's control of IDS. Assuming the applicability of the Investment Company Act, these transactions between Alleghany and affiliated persons of affiliated persons of Alleghany would have been subject to Section 17(a)(2) and, in the case of the loan, Section 17(a)(3) of the Investment Company Act of 1940.[1]

Alleghany's balance sheet as at July 31, 1954 discloses that it expended approximately $1,078,000 in connection with the New York Central proxy contest which expenditure is stated to "have been made on behalf of others, and it is anticipated that the Corporation will be reimbursed [fol. 360] for the same in 1954." To the extent that this expenditure represents an advance or loan to or on behalf of controlling persons of Alleghany, it would have been prohibited, assuming the applicability of the Investment Company Act, by Section 21(b) of that Act as a loan made to a person controlling a registered investment company.

4. *Alleghany is an investment company*

The applicable sections of the Investment Company Act are set forth below:

> Section 2(a)(3), which defines an "affiliated person" of another person to mean, among others,
>
> "(A) any person directly or indirectly owning, controlling, or holding with power to vote, 5 per centum or more of the outstanding voting securities of such other person;
>
> "(B) Any person 5 per centum or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person;
>
> "(C) any person directly or indirectly controlling,

[1] Section 17 is quoted in pertinent part commencing on page 10 of this memorandum.

controlled by, or under common control with, such other person;

"(D) any officer, director, partner, copartner, or employee of such other person; . . ."

Section 3(a), which defines an "investment company" to mean any issuer which—

"(1) is or holds itself out as being engaged primarily or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities;

• • • • •

[fol. 361] "(3) is engaged or proposes to engage in the business of investing, reinvesting, owning, holding, or trading in securities, and owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets (exclusive of Government securities and cash items on an unconsolidated basis.

"As used in this section, 'investment securities' includes all securities except (A) Government securities, (B) securities issued by employees' securities companies, and (C) securities issued by majority-owned subsidiaries of the owner which are not investment companies."

Section 3(c), which provides in part as follows:

"(c) Notwithstanding subsections (a) and (b) none of the following persons is an investment company within the meaning of this title:

• • • • •

"(9) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided*, That the assets of the controlled company consist substantially of securities issued by companies which

are subject to regulation under the Interstate Commerce Act."

Section 17(a), which provides in part as follows:

"It shall be unlawful for any affiliated person of a registered investment company . . . or any affiliated person of such a person . . . acting as principal—

"(1) knowingly to sell any security or other property to such registered company or to any company controlled by such registered company . . .

"(2) knowingly to purchase from such registered company, or from any company controlled by such registered company, any security or other property . . .

"(3) to borrow money or other property from such registered company or from any company controlled by such registered company. . . ."

[fol. 362] Section 17(b), which permits the SEC to exempt a proposed transaction from Section 17(a) if it finds that—

"(1) the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned;

"(2) the proposed transaction is consistent with the policy of each registered investment company concerned, as recited in its registration statement and reports filed under this title; and

"(3) the proposed transaction is consistent with the general purposes of this title."

(b) Alleghany is engaged "primarily, in the business of investing, reinvesting, or trading in securities" within the meaning of Section 3(a)(1).

Table I below shows the number of security issues in Alleghany's portfolio at the end of each year since October 4, 1945:

Table I

End of Year	*Number of Issues in Portfolio*
1945	66
1946	62
1947	38
1948	20
1949	20
1950	35
1951	28
1952	49
1953	33

Table II below shows the total number of security issues purchased or sold by Alleghany during each year beginning with 1945 and the aggregate dollar cost or proceeds. [fol. 363]

Table II

	Purchased[1]		*Sold*[1]	
Year	*Number of Issues*	*Cost*	*Number of Issues*	*Proceeds*
1945	24	$26,572,116	5	$ 8,656,053
1946	27	24,567,077	16	17,087,745
1947	12	9,322,594	26	11,619,600
1948	8	9,048,704	26	15,976,813
1949	24	20,776,145	20	32,455,608
1950	19	13,346,490	11	14,541,769
1951	20	10,669,458	14	9,578,673
1952	31	8,573,466	5	770,423
1953	12	5,776,547	28	20,293,975

[1] Not including transactions by "joint ventures" in which Alleghany participated, as to which transactions sufficient information is not available.

The figures in the above tables indicate that Alleghany is currently, and since 1945 has been, engaged primarily in the business of investing, reinvesting, or trading in securities. As such, apart from Section 3(c)(9) of the Investment Company Act, Alleghany would be an investment company required to be registered under the Investment Company Act.

(c) Alleghany is also engaged in the business of "owning" or "holding" securities within the meaning of Section 3(a)(3)

Even if the investment and trading activities of Alleghany should be considered insufficient to warrant a conclusion that Alleghany is "primarily" engaged in the business of investing, reinvesting, or trading in securities, it seems clear that Alleghany is at least engaged in the business of investing, reinvesting, owning, holding or trading in securities. Alleghany's investment portfolio has been referred to above, and it is apparent that Alleghany owned and held for lengthy periods substantial interests in C & O and in IDS, and that it still owns and holds the in-
[fol. 364] terest in IDS. It is also apparent that these investments constituted "investment securities" as defined in Section 3(a)(3) even though they carried with them control of these companies.

5. *The impact of the Investment Company Act on some of Alleghany's earlier transactions*

As stated in the introductory paragraph of this memorandum, many of the transactions carried out by Alleghany since October 4, 1945 would have been subject to regulation under the Investment Company Act if Alleghany had been registered under that Act. While the SEC does not have knowledge of all of the activities and transactions of Alleghany during the past nine years, it has looked over the annual reports and other information filed by Alleghany with the SEC, and from this source has made up the following list of transactions which would have required an order of approval or exemption prior to their consummation, or would have been prohibited, if Alleghany had been a registered investment company dur-

ing that period. The inclusion of a transaction in the list is not in any sense intended to imply that it would not have been approved or exempted by the SEC upon appropriate application therefor and the development of an adequate record.

(a) Transactions involving Section 17 of the 1940 Act

(1) On January 20, 1950, Robert R. Young and Allan P. Kirby, officers and directors of Alleghany, transferred to Alleghany certain shares of Alleghany's preferred stock, Series A, on which dividends were in arrears to the extent of approximately $103 per share, in exchange for common stock of IDS, the cost of which to Alleghany was $392,800. Section 17(a)(2) would have applied to the purchase of IDS stock by exchange.

[fol. 365] (2) During 1952 Herman R. Neff, a director of Alleghany, borrowed $67,500 from Alleghany in connection with the purchase for $67,500 by Neff from Alleghany of 5,000 shares of stock of Portsmouth Steel Corporation. Section 17(a)(3) would have applied to the borrowings and Section 17(a)(2) to the purchase.

(b) Transactions involving other Sections of the Investment Company Act

(1) In the spring of 1949 Alleghany purchased over 91% of the outstanding voting stock of IDS. Section 12(d) provides that "It shall be unlawful for any registered investment company . . . to purchase or otherwise acquire . . . any security issued by . . . (1) any other investment company . . .", except under certain circumstances not here pertinent.

(2) The purchase on January 20, 1950 by officers of Alleghany of stock of IDS, described above, was made pursuant to an offer extended only to the officers of Alleghany to tender their preferred stock, Series A, of Alleghany in exchange for the stock of IDS. Section 23(c) prohibits a registered closed-end investment company from purchasing any securities of any class of which it is the issuer, except, "(2) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of securities of the class to be purchased; or (3) under

such other circumstances as the Commission may permit by rules and regulations or orders for the protection of investors in order to insure that such purchases are made in a manner or on a basis which does not unfairly discriminate against any holder of the class or classes of securities to be purchased."

[fol. 366] (3) On October 24, 1952 Alleghany offered to the holders of its Cumulative 5-½% Preferred Stock, Series A, the right to exchange a share of such stock for a newly created 5% Sinking Fund Debenture, Series A, due November 1, 1962 in the principal amount of $100 and a warrant unlimited in time to subscribe for and purchase 20 shares of the common stock of Alleghany at a price of $3.75 a share.

Section 18(a)(1) would have prevented this exchange offer because asset coverage for indebtedness of Alleghany did not exceed 300% as required by that section; moreover, the debentures did not include provisions for safeguarding the rights of debenture holders as required by said section. Although Section 18(c)(2) provides an exception from Section 18 for refundings it does not except the refunding of preferred stock by indebtedness.

In addition, Section 18(d) would have prohibited the issuance of the subscription warrants without limitation as to time since it provides that it shall be unlawful for "any registered management company to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe expiring not later than one hundred and twenty days after their issuance . . ."

(4) It is to be noted that the exchange by Alleghany of debentures and common stock subscription warrants for its preferred stock, described in (3) above, as well as an offer of exchange made May 15, 1953 by Alleghany of a newly created $4 Prior Preferred Convertible Stock for its outstanding Prior Preferred Convertible Stocks, are ex-[fol. 367] changes constituting reorganizations as defined in Section 2(a)(32) of the Investment Company Act. Under the provisions of Section 25(b), the SEC is authorized, if so requested by any registered investment company or the holders of 25% of any class of its outstanding

securities, to render an advisory report in respect of the fairness of any plan of reorganization and its effect upon any class or classes of security holders.

6. *Alleghany and the public interest*

Sections 5(2) and 5(3) in the Interstate Commerce Act give recognition to the fact that the corporate structures and financial practices of holding companies controlling subsidiary carrier companies have an impact upon the subsidiaries, and the public interest therein.

Section 5(2) provides in pertinent part as follows:

"(a) It shall be lawful, with the approval and authorization of the Commission,

* * * * *

"(i) . . . For a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise . . .

* * * * *

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected . . .

* * * * *

[fol. 368] "(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the

Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest."

Section 5(3) of the Interstate Commerce Act provides as follows:

"(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, *such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control:* Section 20 (1) to (10), inclusive, of this chapter, sections 304(a)(1) and (2) and 320 of chapter 8 of this title, and section 913 of chapter 12 of this title, (which relate to reports, accou.. ., and so forth, of carriers), and section 20a (2) to (11), inclusive, of this chapter, and section 314 of chapter 8 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this chapter and of section 314 of chapter 8 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest." (underscoring supplied).

Although Section 5(3) of the Interstate Commerce Act indicates that Sections 20(1) to (10) inclusive of chapter 1 of the Interstate Commerce Act, 304(a)(1) and (2) and 320 of chapter 8, and 913 of chapter 12, and 20a(2) to (11) inclusive of chapter 1 and 314 of chapter 8 shall, to the extent provided by the ICC, be applied to a person deemed

to be a carrier pursuant thereto, only Sections 20(1) to (10) and Sections 20a(2) to (11) were applied to Alleghany by the ICC.

[fol. 369] Sections 20(1) to 20(10) relate primarily to the authority of the ICC to require the filing of annual, periodic and special reports: they authorize the ICC to prescribe the times and forms for filing reports, and to establish uniform systems of accounts, rates of depreciation charges, and the forms of any accounts, records and memoranda to be kept (to which the ICC shall have access); they prescribe penalties for failure to comply with such requirements and authorize the institution of mandamus proceedings to compel compliance.

Sections 20a(2) to 20a(11) require the prior approval of the ICC for the issuance of certain securities. In connection with any issuance of securities pursuant to Section 20a the standards laid down in the last sentence of Section 5(3) are required to be met.

Section 5(3) of the Interstate Commerce Act makes applicable to a non-carrier the enumerated sections therein "to the extent provided by the Commission in such order." The SEC suggests that the substantive provisions of the Investment Company Act, which are discussed below, should be deemed by the ICC to provide sufficient assurance of stockholder and public protection and compliance with the underlying objectives of the Interstate Commerce Act to permit the ICC to exercise its discretion under Section 5(3) not to subject Alleghany to Sections 20(1) to (10) and 20a(2) to 11 of the Interstate Commerce Act.

Section 18(a) of the Investment Company Act prohibits the issuance of senior securities representing indebtedness unless there is a minimum asset coverage of all such indebtedness of 300%, and provision is made to prohibit dividends or distributions on the capital stock unless certain asset coverages exist. Similarly the issuance of senior securities representing stocks is prohibited unless a minimum asset coverage of 200% for total indebtedness and Preferred Stock exists and certain other restrictive investor safeguards are included.

[fol. 370] In addition, the Investment Company Act contains other important provisions designed to protect the financial integrity and assets of an investment company.

Section 21, for example, prohibits "upstream" loans. Section 23 contains restrictive provisions covering the sale and repurchase of securities of the investment company.

A most important provision designed to protect the investment company against improvident transactions with "insiders" is found in Section 17(a), (b) and (c) which is quoted and referred to above. Additionally, prohibitions are contained in subsections (d), (e), (f), (g), (h) and (i) of Section 17. Subsection (d) prohibits "insiders" from participating jointly with the investment company in certain transactions in contravention of SEC rules and subsection (e) from accepting "rebates or kickbacks" on the purchase and sale of the investment company's properties or securities, and charging excessive brokerage commissions; subsections (f) and (g) contain provisions designed to safeguard the assets of the company by custodial arrangements, audits and the bonding of persons with access to cash or securities; subsection (h) prohibits certain exculpatory charter or by-law provisions respecting the liability of certain insiders to the company.

It will be seen, therefore, that the evil of over-capitalization, adverted to by Alleghany in its response in this proceeding, and which is the objective of Sections 20a(2) to (11) of the Interstate Commerce Act, will be adequately dealt with and prevented under the provisions of the [fol. 371] Investment Company Act dealing with the capital structure and financial practices of investment companies. Thus, the capital structure of Alleghany which, as at July 31, 1954, was comprised of 34% debt and 50% preferred stock (including dividend arrears), and 16% common stock equity will be protected against the further issuance of senior securities, and the thrust of regulation will be towards the attainment of the standards laid down in the Investment Company Act, namely, a maximum of 50% debt and preferred stock (not more than 33-1/3% debt) and the balance in common stock equity.

The SEC also suggests that the function to be served by compliance with Section 20(1) to (10), inclusive, of the Interstate Commerce Act will be adequately served by compliance with the reporting requirements of Section 30 of the Investment Company Act. Despite the implication

of Alleghany to the contrary in its response in this proceeding, the SEC does not understand how these reporting requirements could possibly destroy or affect the continuity of accounting data filed since 1945 by Alleghany with the ICC. Section 30 of the Investment Company Act, as interpreted by the SEC, imposes no requirements as to the keeping of accounts other than compliance with sound accounting principles. This would not require any changes by Alleghany in its method of internal accounting. The reports required to be filed with the SEC under the Invest- [fol. 372] ment Company Act would contain all of the substantive data and most of the details contained in the reports currently being filed with the ICC.[1]

Of course it is not suggested that in any respect Alleghany, as any other person, would be relieved from compliance with Section 5(2) of the Interstate Commerce Act so that there will be reserved to the ICC the power to approve or deny Alleghany's control of carriers.

7. *Conclusion*

The SEC is prepared to assume its regulatory responsibilities with respect to Alleghany under the Investment Company Act, and it respectfully suggests that the overall legislative policy expressed by Congress in the Investment Company Act and in the Interstate Commerce Act will best be carried out by revocation of the ICC order of

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[1] Article 6 of Regulation S-X promulgated under the Investment Company Act prescribes the reports which are to be filed by closed-end investment companies with the SEC, and the manner of their presentation. In addition to most of the data contained in the reports filed with the ICC, Regulation S-X requires data essential to the interests of investors such as disclosure of realized gains or losses on investments, statements of unrealized appreciation or depreciation of investments, information showing the value as well as the cost of each investment and information showing separately the distribution made to shareholders from net investment income and from realized gain on investments.

June 5, 1945, and by the ICC declining to enter any new order declaring Alleghany to be a "carrier" subject to regulation under the Interstate Commerce Act.

Respectfully submitted, William H. Timbers, General Counsel.

[fol. 373] [File endorsement omitted]

[fol. 374] BEFORE THE INTERSTATE COMMERCE COMMISSION

IN THE MATTER
of the

Application under Section 5(2) of the Interstate Commerce Act for an order approving and authorizing:

(1) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Louisville & Jeffersonville Bridge and Railroad Company to merge their properties and franchises;

(2) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as lessor, and The New York Central Railroad Company, as lessee, to include the properties of Louisville & Jeffersonville Bridge and Railroad Company under their lease of January 2, 1930; and

(3) The New York Central Railroad Company and Alleghany Corporation to acquire, in view of their control of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, control of the properties and franchises of Louisville & Jeffersonville Bridge and Railroad Company.

FINANCE DOCKET No. 18656

APPLICATION OF C. C. C. & ST. L. RY. CO., ET AL, RE MERGER—
filed September 20, 1954

To The Interstate Commerce Commission:

THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY (hereinafter called the Big Four) and LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY

(hereinafter called the Bridge Company) hereby apply under Section 5(2) of the Interstate Commerce Act for [fol. 375] an order of the Commission approving and authorizing the merger of the properties and franchises of the Bridge Company into the Big Four for ownership, management and operation of the properties now in separate ownership, as hereinafter set forth;

The Big Four, as lessor, and THE NEW YORK CENTRAL RAILROAD COMPANY (hereinafter called the Central), as lessee, hereby apply under said Section 5(2) for an order approving and authorizing—

(a) the making by them of a proposed Confirmatory Supplemental Lease evidencing the inclusion under the lease dated January 2, 1930, made by the Big Four as lessor to the Central as lessee, as heretofore supplemented and amended, as owned properties of the lessor, of properties of the Bridge Company proposed to be acquired by the lessor through merger (which lease as so supplemented and amended is hereinafter called the Lease), and

(b) the lease and operation of said properties by the Central as owned properties of the lessor under the terms and provisions of the Lease as amended and supplemented;

as hereinafter set forth; and

The Central and ALLEGHANY CORPORATION (hereinafter called Alleghany) hereby apply, in view of their control of the Big Four, for an order under said Section 5(2) approving and authorizing control by them of the properties and franchises of the Bridge Company as hereinafter set forth. Central and Alleghany join in this application for the same reason that Alleghany, which formerly had a relationship with The Chesapeake and Ohio Railway Company similar to its present relationship with the Central, joined in the application, pursuant to the direction of the Commission, in Finance Docket No. 6790, *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546, to acquire control of the Chesapeake Company's leasehold interest in a new extension. See also *Chesapeake & O. Ry. Co. Purchase*, 261 I. C. C. 239.

In support of this application the applicants show, in accordance with Order dated October 14, 1940:

[fol. 376] I

CONTENTS OF APPLICATION

(a) Identification of applicant, or of each applicant, if there are two or more applicants, showing:

1. The full and correct names of the applicants are as follows:

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Louisville & Jeffersonville Bridge and Railroad Company,
The New York Central Railroad Company and
Alleghany Corporation.

The business address of the Big Four, the Bridge Company and the Central is 466 Lexington Avenue, New York 17, N. Y.; the business address of Alleghany is 4500 Chrysler Building, New York 17, N. Y.

2. Each of the applicants is a corporation.

3. The Big Four, the Bridge Company and Central are carriers by railroad subject to Part I of the Interstate Commerce Act, the Big Four being a lessor company as hereinafter mentioned. Alleghany is not a carrier by railroad, but by order of the Commission entered on June 5, 1945 in Finance Docket No. 14692, *Ghesapeake & O. Ry. Co. Purchase, supra,* is to be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

4. The owned and leased lines of railroad of the Big Four (operated by the Central, under the Lease) are located in the States of Ohio, Indiana, Illinois and Michigan, and it has trackage rights over 2.12 miles of railroad in Kentucky and 8.18 miles in Missouri.

The owned railroad and physical property of the Bridge Company are located in the States of Kentucky and Indiana.

5. Correspondence with respect to this application should be addressed to H. H. McLean, General Counsel of the railroad applicants, 466 Lexington Avenue, New York 17, N. Y., and to E. K. Wheeler, Southern Building, 15th [fol. 377] and H Streets, N. W., Washington 5, D. C., counsel for Alleghany.

6. The Big Four has been engaged as a common carrier by railroad in interstate commerce, or its railroad has been operated in such commerce by the Central under lease, from a date prior to the enactment of the Transportation Act of 1920.

The Bridge Company and the Central have been engaged as common carriers by railroad in interstate commerce from a date prior to the enactment of the Transportation Act of 1920.

Alleghany is not engaged and has not been authorized by the Commission to engage as a common carrier by railroad in interstate or foreign commerce. See paragraph 3 above.

(b) Information respecting applicant, or each applicant, if there are two or more applicants, as follows:

1. *If applicant is a corporation:*

(1) The Big Four was organized and now exists under the laws of the States of Ohio and Indiana. It was created by consolidation of the Cleveland, Columbus, Cincinnati and Indianapolis Railway Company, the Indianapolis and St. Louis Railway Company and the Cincinnati, Indianapolis, St. Louis and Chicago Railway Company under Agreement of Consolidation dated March 19, 1889, filed in the offices of the Secretaries of State of Ohio and Indiana, respectively, on June 7, 1889, and June 8, 1889. By agreement of Merger dated December 15, 1937, filed in the offices of the Secretaries of State of Ohio and Indiana on June 30, 1938, the Big Four merged into itself certain other companies (228 I. C. C. 240).

The Bridge Company was organized and now exists under the laws of the States of Kentucky and Indiana, having been originally separately incorporated in each of said States under the name of Louisville and Jeffersonville Bridge Company, which was changed in 1917 to

Louisville & Jeffersonville Bridge and Railroad Company. It was formed by Deed of Consolidation dated April 25, 1890, between the Kentucky constituent and the Indiana constituent.

The Central was organized and now exists under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan. It was created by consolidation of The New York Central and Hudson River Railroad [fol. 378] Company, The Lake Shore and Michigan Southern Railway Company and others under an agreement dated April 29, 1914, which was approved by orders of the regulatory commissions of the States having jurisdiction, and duly filed in the offices of the Secretaries of State of New York, Indiana, Ohio and Illinois on December 22, 1914, in the office of the Secretary of the Commonwealth of Pennsylvania on December 22, 1914, and in the office of the Secretary of State of Michigan on December 23, 1914. By Agreement of Merger dated February 13, 1952, and filed in the above mentioned public offices on June 30, 1952, the Central merged into itself certain other companies (I. C. C. Order dated June 18, 1952, in F. D. Nos. 17700 & 17701).

Alleghany is a corporation incorporated under the laws of the State of Maryland on January 26, 1929. In addition, Alleghany is authorized to do business in the States of New York and Delaware.

[fol. 379] All of the capital stock of the Bridge Company is owned by the Big Four and is held by the Central under the Lease.

2. *If applicant is a copartnership:*

Not applicable.

3. *If applicant is an association or other form of organization, except a corporation:*

Not applicable.

4. *If applicant is a trustee, receiver, assignee or a personal representative of the real party in interest:*

Not applicable.

5. *If applicant is not a carrier:*

(1) See (b) 1. above.

(2) Alleghany's Certificate of Incorporation provides for broad powers to engage in any lawful business. At all times since its incorporation in 1929, Alleghany has been engaged in the investment business, its holdings consisting of corporate securities and, to a large extent, of securities of railroad companies subject to the Interstate Commerce Act.

6. The Big Four, the Bridge Company and the Central have been engaged in the type of business in which they [fol. 380] are now respectively engaged since their formation in the years 1889, 1890 and 1914, respectively, except that prior to February 1, 1930, the Big Four was an operating carrier and from and after that date it has been a lessor company.

For the past nine years, Alleghany has been subject to regulation as a carrier by the Interstate Commerce Commission. In 1944, The Chesapeake and Ohio Railway Company, then controlled by Alleghany, filed an application under Section 5(2) for approval and authorization of the acquisition by it of the properties of the Norfolk Terminal and Transportation Company, all of whose stock was owned by the Chesapeake and Ohio and whose properties were under long-term lease to the C&O. Pursuant to the *Marshall Transport* case,* Alleghany filed a supplemental application joining in the application of the C&O and seeking approval and authorization under Section 5(2) of the Act of control by it through the C&O of the properties of the Terminal Company. By order of the Interstate Commerce Commission entered on June 5, 1945 in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase, supra,* the Commission approved the acquisition and control of the Terminal properties and held Alleghany was to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11),

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*U. S. v. *Marshall Transport Co.*, 322 U. S. 31. See also *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546.

inclusive, of the Interstate Commerce Act. Subsequently, by order dated October 4, 1945, pursuant to an application under Section 8(f) of the Investment Company Act, the Securities and Exchange Commission ordered that the registration of Alleghany under that Act as a closed-end, non-diversified management investment company should forthwith cease to be in effect, with the proviso that, if in the future Alleghany should cease to be subject to regulation under the Interstate Commerce Act, the order of October 4, 1945, might be revoked, suspended or modified.

Alleghany's present status as a carrier under the Interstate Commerce Act is in all respects identical with that obtaining on June 5, 1945. Alleghany recently relinquished control of The Chesapeake and Ohio Railway Company and the affiliated carriers controlled by it and in substitution thereof acquired control of the Central and the affiliated carriers controlled by it. Alleghany's relationship to the Central and its affiliated carriers is in all material respects [fol. 381] the same as its relationship to the C&O and its affiliated carriers was on June 5, 1945. Alleghany's status as the company controlling a railroad system is the same and will continue to be the same as it has been during the past nine years.

Prospectively, Alleghany intends to increase its holdings of the securities of the Central and of other railroad companies subject to the Interstate Commerce Act. At the same time, it will continue a process started about a year ago of decreasing its investments in companies not subject to the jurisdiction of the Commission. As part of its program of rehabilitation of the Central System and pursuant to the Commission's declared policy of corporate simplification, Alleghany expects and reserves the right to apply to the Commission for further orders to simplify the internal structure of the Central System by mergers, consolidations, leases and/or other acquisitions of properties. In line with these policies, Alleghany requests an order in this proceeding approving and authorizing the acquisition and control by Central, Alleghany and the Big Four of the properties, etc., of the Bridge Company, and containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section

20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, as provided by Section 5(3) of the Interstate Commerce Act. Such an order will be in accordance with the Commission's similar order of June 5, 1945 in Finance Docket No. 14692 and would appear to be required by the intent of Congress in enacting Section 5(3) as revealed in the legislative history of that section.*

7. The Big Four is controlled by the Central by reason of the latter's ownership of 465,514 shares of the common capital stock and 86,436 shares of the preferred capital stock of the Big Four, constituting 98.98 per cent and 86.45 per cent, respectively, of the total number of shares of each class outstanding. The railroad and properties of the Big Four are operated by the Central under lease dated January 2, 1930 (effective February 1, 1930) for a term of ninety-nine years, which lease (with supplements thereto dated May 12, 1937, June 30, 1938 and January 1, [fol. 382] 1942, respectively) is herein sometimes referred to as the Lease. A copy of said lease and of each of said supplements was filed with the Commission in Finance Docket No. 5690, to which reference is hereby made.

The Bridge Company is controlled by the Big Four and the Central by reason of the Big Four's ownership of all of the capital stock of the Bridge Company, which is held by the Central under the terms of the Lease.

The Big Four and the Bridge Company are indirectly controlled by Alleghany, which recently acquired control of the Central as the result of a proxy contest in which the slate of directors nominated by Alleghany was elected as the Central's Board of Directors. Alleghany has an undivided one-half interest in 600,000 shares of Central stock with voting rights to said 600,000 shares under joint venture agreements. In addition to said 600,000 shares, Alleghany has 15,500 shares of Central stock. These voting rights of Alleghany represent almost 10 per cent of the total shares of the Central outstanding. The Chairman

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*See Response of Alleghany Corporation, July 15, 1954 in Finance Docket 14692.

of the Board of Directors of Alleghany is Chairman of the Board of Directors of the Central, the President of Alleghany is a Director of the Central, and the Vice-President of Alleghany is a Vice-President of the Central. The Chairman of the Board of Directors of Alleghany and of Central beneficially owns 100,200 shares of Central stock. The President of Alleghany beneficially owns 300,100 shares of Central stock.

Alleghany is not controlled by any other corporation or corporations.

8. In addition to their control of the Bridge Company as above described, the Big Four and the Central also control the Peoria and Eastern Railway Company by virtue of the ownership by the Big Four of a majority of the stock of that company, which is held by the Central under the Lease, and the Peoria and Eastern Railway is operated by the Central as lessee of the Big Four under Operating Agreement dated February 22, 1890, as supplemented and extended by Agreement dated April 1, 1940. The railroad of Central Railroad Company of Indianapolis is leased to the Big Four for a term of ninety-nine years commencing February 5, 1917, and is operated by the Central as lessee of the properties of the Big Four under the Lease. [fol. 383] Central, as the parent railroad company, also controls other carrier corporations which are members of a group known as the New York Central System (see paragraph 9 below). Alleghany, in turn, controls Central and its affiliated carriers (see paragraph 7 above). In addition to its control of Central, Alleghany also owns $1,069,000 principal amount of general mortgage, 4 per cent bonds and 396,000 shares of common stock of the Missouri Pacific Railroad Company, which is presently in reorganization under Section 77 of the Bankruptcy Act.

9. The Big Four, the Bridge Company and the Central are members of a group of corporations, known as the New York Central System, of which the Central is the parent railroad company. Central is controlled by Alleghany. The relationship of the Big Four, the Bridge Company and the Central among themseslves and to the

other members of said group is shown in the Central's annual report to the Commission for the year ended December 31, 1953, under Schedules 104B, 217, 218, 295, 375, 383, 383-A, 411 and 581 (paragraph e), the annual report to the Commission of the Lessors of the Central for said year under Schedules 101, 109, 212 and 217, and the annual report to the Commission of the Bridge Company for said year under Schedules 108 and 109.

10. There are no intercorporate relationships material in the present connection not disclosed herein or in the annual reports to the Commission referred to in 9, above, or in reports by Alleghany to the Commission.

11. The applicants have a number of officers and directors in common as shown in I.(b), (2) and (3) above. After the name of each officer shown in I.(b) (3) above, there is a reference to the Commission's order (where required) authorizing the holding of such positions, to which reference is made. In addition to the principal officers in common there shown there are an Assistant Secretary and certain Assistant Treasurers, Assistant Comptrollers and other assistant officers, also counsel, engineers and others, common to some or all of the applicants, except Alleghany.

As to persons who are Directors in common, but not officers included in I.(b) (3) above, the following is a reference to the Commission's orders authorizing the holding of such positions in common:

[fol. 384]

Name	Commission's Order
Harold H. McLean	Dated September 30, 1949 F. D. No. 16725
Charles R. Hook	Dated December 2, 1937 F. D. No. 11861
Harry T. Pritchard	Dated May 14, 1947 F. D. No. 15703

12. The amount of each of the applicants' outstanding stock, by classes, the par value of each share, its voting rights, the total number of stockholders of record (who

are the only security holders having voting power) are as follows:

Name of Applicant and Class of Stock:	Number of Shares Outstanding:	Par Value:	Shares having Voting Power of One Vote:	Number of Stockholders (as of close of Aug. 24, 1954):
Big Four				
Common	470,288	$100	470,288	177
Preferred	99,985	$100	99,985	466
Bridge Company				
Capital Stock	14,250	$100	14,250	8 (including seven directors holding qualifying shares)
Central				
Capital Stock	6,447,410.0525	no par	6,447,410	41,606
Alleghany				
$4 Prior Preferred Convertible Stock	25,845	no par	25,845*	169
Preferred Stock, Series A	136,744	$100	136,744*	1,312
Common Stock	4,637,797	no par	4,637,797*	16,499

* The $4 Prior Preferred Convertible stockholders are entitled to vote, as a class, for the election of two directors, the Preferred Series A, stockholders are entitled to vote, as a class, for the election of two directors; and the Common stockholders are entitled to vote, as a class, for the remaining four directors and on all other matters.

[fol. 385] (c) Information respecting the nature of the transaction proposed and the terms and conditions thereof as follows:

1. The proposed transaction, which the Commission is requested to approve and authorize, is a merger into the Big Four of the Bridge Company pursuant to the laws applicable to such merger; the inclusion of the properties of the Bridge Company, when acquired by the Big Four through such merger, in the Lease as owned properties of the Big Four; and the acquisition by the Central and Alleghany, in view of Alleghany's control of the Central and the Central's control of the Big Four, of control of the properties and franchises of the Bridge Company.

2. Such merger is to be effected under authority of Section 5 of the Interstate Commerce Act, as amended, by means of an Agreement of Merger dated September 14, 1954, between the Bridge Company and its Directors and

the Big Four and its Directors, whereby all of the railroads, properties, interests, rights, privileges and franchises of the Bridge Company will be transferred to the Big Four, subject to any and all mortgages or deeds of trust (if any), liens and charges thereon, and in consideration thereof the Big Four will assume all contracts, deeds, obligations, liabilities and duties of the Bridge Company, and it is further provided that all shares of capital stock, and the certificates therefor, of the Bridge Company will be cancelled and no stock or other securities will be issued in respect thereof, all as more fully provided in said Agreement of Merger, to which reference is made (Exhibit 7). All inter-company indebtedness and contractual obligations between the parties to the merger will be extinguished as a result of the merger without impairment of any rights of third parties. The Agreement of Merger has been executed by the Directors of the Big Four and the Bridge Company and is to be submitted for adoption by the stockholders of each of those companies at meetings of stockholders to be held as follows:

Big Four:

Annual meeting on October 27, 1954.

Bridge Company:

Special meeting on November 5, 1954.

The Agreement of Merger is by its terms to become effective as of December 31, 1954, if approved and authorized by the Commission and adopted by the vote of the holders of two-thirds of each class of the capital stock of each of the parties thereto by that date; otherwise to become [fol. 386] effective when so approved, authorized and adopted. Under applicable State laws of Ohio, Indiana and Kentucky, such two-thirds vote of stockholders is the maximum required. Notices of such stockholders' meetings will be given as required by Section 5(11) of the Interstate Commerce Act and the laws of the several States concerned. For the purpose of evidencing said merger in the appropriate public records counterparts of the Agreement of Merger will be tendered for filing in the respective

offices of the Secretaries of State of Ohio, Indiana and Kentucky. As provided in the Agreement of Merger, the Big Four, which is to be the surviving corporation, is not by reason of such merger, or the filing of a counterpart or copy of the Agreement of Merger in Kentucky, to become a corporation of Kentucky but is to remain as at present a corporation of Ohio and Indiana only.

The railroad and properties of the Bridge Company are to be operated, after the merger and during the remaining term of the Lease, by the Central, as a part of the owned lines of railroad of the Big Four, under the terms and provisions of the Lease. Therefore, the Commission's approval and authorization is requested of (a) the execution and delivery by the Big Four and the Central of a proposed Confirmatory Supplemental Lease substantially in the form of draft thereof hereto attached, marked "Exhibit 7-a", confirming the inclusion in the Lease as owned properties of the Big Four of the properties therein described proposed to be acquired by the Big Four through merger of the Bridge Company, and (b) the lease and operation by the Central of said properties as owned properties of the Big Four under the terms and provisions of the Lease as so supplemented; and in support of this request the Big Four and the Central respectfully show:

That by application to the Commission dated July 28, 1926, in Finance Docket No. 5690, the Central applied for authority to acquire control under lease of, among other properties, the railroad system of the Big Four in accordance with the terms of the proposed lease of said Big Four's system properties set forth in said application, which authority was granted by the Commission by its said order dated July 2, 1929, in Finance Docket No. 5690 (154 I. C. C. 489), subject to certain conditions prescribed; and by order dated December 2, 1929, in Finance Docket No. 7744 (158 I. C. C. 317) the Commission authorized the Central, as lessee, to assume obligation and liability in respect of securities in accordance with the provisions of said proposed lease of the Big Four system properties.

[fol. 387] That under authority of said order dated July 2, 1929, in Finance Docket No 5690, and said order dated December 2, 1929, in Finance Docket No. 7744, the Big

Four as lessor executed and delivered to the Central as lessee the proposed lease of its properties dated January 2, 1930, effective February 1, 1930, which lease was modified in certain respects by Supplemental Agreement between the parties thereto dated May 12, 1937, Confirmatory Supplemental Lease dated June 30, 1938, and Supplemental Agreement dated January 1, 1942, executed under authority of the Commission's orders dated July 12, 1937, June 17, 1938, and December 30, 1942, respectively, in said Finance Docket No. 5690 (see 221 I. C. C. 573, 228 I. C. C. 240 and 254 I. C. C. 837), certified copies of which lease and supplemental instruments (herein collectively referred to as the Lease) were filed with the Commission in said Finance Docket No. 5690.

The Lease by its terms includes, in addition to the owned railroad properties of the Big Four, certain other properties including all right, title and interest of the Big Four in and under an agreement dated January 1, 1927, for use by the Big Four, in common with others, of the bridge, tracks, etc. of the Bridge Company at Louisville, Ky., and Jeffersonville, Ind., as set forth in Paragraph (4) of Article I of the Lease and in and to the Big Four's holdings of shares of capital stock of the Bridge Company (consisting of 14,250 shares and being the entire amount outstanding) as set forth in Paragraph (10) of Article I of the Lease.

Upon the consummation of the merger the properties of the Bridge Company acquired by the Big Four as a result of such merger will, in the opinion of counsel, be included in the Lease by virtue of the after-acquired property provisions thereof.

It is deemed appropriate that the inclusion under the Lease of said properties of the Bridge Company to be acquired by the Big Four through such merger, as owned properties of the Big Four, should be confirmed and evidenced by the execution and delivery of the proposed Confirmatory Supplemental Lease and that by such instrument provision should be made for the release from the Lease of the Central's interest thereunder in the capital stock of the Bridge Company referred to above, so that such

shares of stock of the Bridge Company may be cancelled incident to the proposed merger.

The transaction proposed is to be made under the authority of Section 5 of the Interstate Commerce Act, as amended, and the applicants rely on the provisions of that Act, particularly paragraph (11) of said Section [fol. 388] 5, for any and all powers that they might not otherwise have under State laws necessary or appropriate to carry the proposed merger into effect, and for the Big Four to own and operate, and for the Central to operate, any and all properties and for each of the applicants to exercise any and all control or franchises acquired through said transaction, and for relief from the operation of all laws, restraints, limitations and prohibitions of law, insofar as may be necessary to enable the applicants to carry into effect the said transaction, and to enable the Big Four and Central to own, or hold, maintain and operate the properties and to enable each of the applicants to exercise the control or franchises to be acquired by it through said transaction, to the full extent provided by said paragraph (11) of Section 5.

Applicants propose, however, in effecting such merger, to observe as far as practicable (and to the full extent required by said Section 5) the requirements of the laws of the several States involved relating to merger or control of railroad corporations, particularly as regards procedure, notice of stockholders meetings, form of the merger agreement and the filing of such agreement in the offices of the Secretaries of State of the several States involved, but they do not propose to seek the approval of State regulatory commissions or to make the taking effect of the merger dependent on filing of the Agreement of Merger in State offices as provided by State laws. In this connection applicants refer to certain provisions of Kentucky law with which it is impossible to comply without defeating the main purpose of the proposed transaction (i. e., the simplification of the corporate structure of the Big Four portion of the Central's system). The Kentucky laws referred to purport to provide that before a corporation of any other State may possess, control, maintain or operate any railroad in Kentucky, or condemn,

purchase or hold land for railroad purposes, it must file with the Secretary of State of Kentucky an acceptance of the Kentucky constitution and become a corporation of that State (*Kentucky Revised Statutes, Sec. 277.020*); that if a Kentucky railroad corporation consolidates by sale or otherwise with a corporation of any other State, it does not thereby become a foreign corporation as to Kentucky (*Constitution, Sec. 200; K. R. S. Sec. 271.465 et seq.*); and that charter papers, including merger agreements, in order to become effective, must first be filed in the office of the Secretary of State of Kentucky (*K. R. S. Secs. 271.470 and 277.110*). Applicants submit that compliance with such requirements would not be consistent with the [fol. 389] public interest, would not accord with the national transportation policy and would involve needless expense and be an unnecessary burden on interstate commerce. (*Seaboard R. Co.* v. *Daniel*, 333 U. S. 118; *Schwabacher* v. *U. S.*, 334 U. S. 182, 194-195; *Missouri Pacific R. Co. Reorganization*, 275 I. C. C. 59, 142-145; *Penndel Company Purchase, Stock, etc.*, F. D. No. 18345, decided December 30, 1953). For relief from all such restraints, limitations and prohibitions the applicants will rely on the powers granted by the provisions of Section 5 of the Interstate Commerce Act, particularly paragraph (11) thereof.

3. Aside from intercompany indebtedness between the Big Four and the Bridge Company, which will be extinguished by the merger as above stated, there are no financial or other relationships, direct or indirect, not heretofore disclosed in this application, existing at the present time between the applicants.

4. The owned lines of railroad of the Big Four, aggregating 2,252.13 miles, radiate from Indianapolis, Indiana, to various points including Cleveland, Sandusky, Columbus and Cincinnati, Ohio, Jackson, Michigan, Goshen, North Vernon, Lafayette and Evansville, Indiana, Danville, East St. Louis and Cairo, Illinois. There are numerous branches and some detached segments. The Big Four's owned main lines and branches, and the lines of the

Peoria and Eastern Railway Company and Central Railroad Company of Indianapolis, which are held under operating agreement or lease, are as follows:

The main lines of the Big Four, aggregating 2007.56 miles (exclusive of the trackage described below), extend (1) from Cleveland, Ohio, via Galion, Bellefontaine and Ansonia, Ohio, Anderson, Indianapolis and Terre Haute, Ind., Midland, Hillsboro and Lenox, Ill., to St. Louis, Mo., included in which is trackage over the lines of the Terminal Railroad Association of St. Louis between E. St. Louis, Ill. and St. Louis; (2) from Cincinnati, Ohio, via Valley Jct., Ohio, Lawrenceburg Jct., Greensburg, Fairland, Indianapolis, Lafayette, Templeton and Sheff, Ind., and Kankakee, Ill., to Chicago, Ill., included in which is trackage over the New York, Chicago and St. Louis Railroad between Lafayette and Templeton, Ind., and over the line of the Illinois Central Railroad between Kankakee and Chicago, Ill.; (3) from Galion, via Delaware, Columbus, Springfield, Cold Springs, Carlisle Jct. and Ivorydale, to Cincinnati, all in the State of Ohio, included in which is trackage over the Baltimore & Ohio Railroad from Ivory-
[fol. 390] dale to Cincinnati, Ohio; (4) from Cairo, via Mt. Carmel, St. Francisville and Midland to Danville, all in the State of Illinois; (5) from Cold Springs, Ohio, via Savona, Ohio, and Shirley, Ind. to Indianapolis, Ind.; (6) from Goshen, via Anderson, Shirley, Greensburg, and North Vernon to Jeffersonville, all in the State of Indiana, included in which is trackage over the Baltimore & Ohio Southwestern Railway between North Vernon and Jeffersonville, Ind.; (7) from Sandusky, via Bellefontaine to Springfield, all in the State of Ohio; (8) from Carlisle Jct., Ohio, via Savona and Ansonia, Ohio, to Jackson, Mich.; (9) from Terre Haute, Ind., to Evansville, Ind.; and (10) from St. Joseph, via Benton Harbor to Niles, all in the State of Michigan, in which is included trackage over the Chesapeake and Ohio Railway between St. Joseph and Benton Harbor, Mich.

Branches from such main lines extend from:

Delaware, Ohio, to Springfield, Ohio....	48.96	miles
Hillsboro, Ill., to Lenox, Ill.....	55.66	"
Valley Jct., Ohio, to Beeson, Ind.....	56.68	"
Greensburg, Ind., to Columbus, Ind.....	24.28	"
Duff, Ind., to Washington, Ind.....	2.32	"
Mt. Carmel, Ill., to Evansville, Ind.....	32.51	"
East Alton, Ill., to Alton, Ill.....	4.18	"
Fairland, Ind., to Trafalgar, Ind.....	19.98	"
Total branches	244.57	"

The main line of the Peoria and Eastern Railway, aggregating 201.53 miles, extends from Indianapolis, Ind., via Danville, Ill., to Pekin, Ill., with trackage from Pekin to Peoria, Ill., over the Peoria and Pekin Union Railway. It has no branches.

The Central Railroad of Indianapolis comprises 1.94 miles of yard switching tracks in the City of Indianapolis, Ind.

The railroad of the Bridge Company extends from Jeffersonville, Indiana, to Louisville, Kentucky, 2.70 miles, and comprises, with the yard tracks and sidings, a total of about 23 miles of track. It connects for interchange of traffic with the Pennsylvania Railroad and the Baltimore and Ohio Railroad at Jeffersonville, Indiana; and with the Louisville and Nashville Railroad, Illinois Central Railroad and the Chesapeake and Ohio Railway at Louisville, Kentucky. There is no physical connection between the tracks of the Bridge Company and the owned or leased lines of the Big Four, but the Big Four has trackage [fol. 391] rights from North Vernon, Indiana, to a connection with the railroad of the Bridge Company at Jeffersonville, Indiana, a distance of 52.21 miles, over the Baltimore and Ohio Railroad, which trackage rights are used by the Central as lessee of the Big Four properties.

5. The property involved in the proposed merger includes all of the property of the Bridge Company.

6. The value of the owned carrier property of the Big Four and the Bridge Company, as of the valuation date shown in each case, as found by the Commission, and the net cost of additions and betterments after the date of valuation are as follows:

BIG FOUR

Final Valuation as of June 30, 1915, as found by the Interstate Commerce Commission in Valuation Docket No. 264		$146,777,609.00
Less Working Capital		5,000,969.00
Final value as of June 30, 1915		$141,776,640.00
Additions and Betterments since date of Valuation June 30, 1915, to June 30, 1954:		
Corporate Account—701		
Investment in R. & E. as of June 30, 1915	$144,375,812.03	
Additions and Betterments to June 30, 1954	188,699,640.00	188,699,640.00
Investment in R. & E. as of June 30, 1954	$333,075,452.03	
Value as of June 30, 1954		$330,476,280.00

BRIDGE COMPANY

Final Valuation as of June 30, 1915, as found by the Interstate Commerce Commission in Valuation Docket No. 178	$ 2,977,210.00
Less Working Capital	127,210.00
Final Value as of June 30, 1915	$ 2,850,000.00

Additions and Betterments since date of Valuation June 30, 1915, to June 30, 1954:

Corporate Account—701

Investment in R. & E. as of June 30, 1915.....	$ 4,103,987.28	
Additions and Betterments to June 30, 1954	2,463,989.00	2,463,989.00
Investment in R. & E. as of June 30, 1954....	$ 6,567,976.28	
Value as of June 30, 1954.....		$ 5,313,989.00

[fol. 392] 7. The policies and practices of the Central, the Big Four and the Bridge Company with respect to reserves for depreciation and similar reserves are such as are prescribed by the Interstate Commerce Commission.

8. No securities are to be acquired by the applicants, or any of them, in consummating the proposed transaction.

9. The property of the Bridge Company is not encumbered by any mortgage or similar indenture. Parts of said property are subject to trackage rights in favor of the Big Four and the Chesapeake and Ohio Railway Company, respectively. Such trackage rights of the Big Four are subject to its Refunding and Improvement Mortgage dated June 27, 1919, and the Central's interest therein is subject to the Central's Refunding and Improvement Mortgage dated October 1, 1913, as extended by Supplement dated February 1, 1930. Both of these mortgages contain provisions permitting modification or termination of such trackage rights.

10. A merger rather than a consolidation is proposed. No new corporation will result. The Bridge Company will be merged into the Big Four which as above stated is a consolidated railroad corporation organized and now existing under the laws of the States of Ohio and Indiana. Neither the Big Four nor the Central is to become a corporation of Kentucky by reason of the merger or the filing of any documents therein or otherwise. As no stock or other securities are to be issued in connection with the merger, the capitalization of the Big Four will not be

affected. The Big Four now has an authorized capital stock of 500,000 shares of common stock and 100,000 shares of preferred stock, all of the par value of $100 per share, of which 470,353 shares of common have been issued and are outstanding with the exception of 65 shares held in the treasury, and 100,000 shares of the preferred have been issued and are outstanding with the exception of 15 shares held in the treasury.

[fol. 393] (d) Facts and circumstances relied upon to show that the proposed transaction is within the scope of section 5(2)(a) of the Interstate Commerce Act, will be consistent with the public interest, and will otherwise be within the requirements of section 5, particularly:

1. *In case of any proposed transaction:*

(a) The proposed transaction is within the scope of Section 5(2)(a) of the Interstate Commerce Act in that it involves a merger of the properties and franchises of the Bridge Company into the Big Four, both of which are common carriers by railroad. The application contemplates a change of existing control in that the Big Four would control, through merger, the properties of the Bridge Company, instead of control through stock ownership, and the control of the Big Four and the Bridge Company by Central and Alleghany would likewise be changed. Internal rearrangements of corporate structure require filing of an application under Section 5(2)*. Central and Alleghany join in this application pursuant to the *Marshall Transport* case** and prior decisions of the Commission***.

(b) The proposed transaction will be consistent with the public interest and will otherwise be within the requirements of Section 5 for the reasons hereinafter stated.

(1) The proposed merger is in accord with the declared policy of the Commission to encourage unifications as be-

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* *Chesapeake & O. Ry. Co. Purchase,* Finance Docket No. 14692, *supra.*

** *Supra.*

*** *Nicholas, Fayette & Greenbrier R. Co. Lease, supra; Chesapeake & O. Ry. Co. Purchase, supra.*

ing desirable in the public interest****. The elimination of the Bridge Company as a separate entity will promote the public interest in that it will simplify the corporate structure of the Big Four segment of the Central System. The Commission has recognized that the merger of commonly controlled carriers engaged in transportation is normally desirable because of greater efficiency and economy in operation which, in turn, will inure to the benefit of the shipping public. In furtherance of plans for improved rendition of service to the public and realization of further [fol. 394] economies in operation, it is expected that eventually the Big Four and other system lines will be unified with the Central by merger or otherwise. Prior merger of the Bridge Company into the Big Four, as now proposed, will substantially simplify such further unification of the New York Central System, if and when undertaken.

The principal savings to be realized by the effectuation of the proposed merger will consist of (a) elimination of the cost of maintaining the Bridge Company as a separate entity with the attendant expense of holding Directors and Stockholders meetings; (b) savings in accounting and other expenses made necessary by reason of the Bridge Company properties being separately owned and operated; (c) elimination of various separate reports to commissions and other regulatory bodies now required of the Bridge Company; and (d) reduction in the number of system companies will reduce the work of various officers and employees, particularly in the Secretary's office and the Accounting, Law and Treasury Departments. It is not contemplated that any reduction in forces will be made as a result of the merger, but it is expected that the additional time of such officers and employees resulting therefrom will be directed in productive channels so as to enable the applicants to realize even greater savings.

(2) Savings are expected to result from the merger, but it is not possible at this time to make a reliable estimate of the amount thereof. No change in traffic or gross revenues is expected to result from the merger inasmuch as there

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**** *Bessemer & L. E. R. Co. Merger*, 275 I. C. C. 167, 179.

will be no substantial change in operations. Net earnings would be increased to the extent that the savings above referred to are realized and earnings available for fixed charges would be increased accordingly.

(3) The proposed merger will have no direct effect upon transportation service to the public inasmuch as the railroad of the Bridge Company is now a part of the Central's system and operation thereof will be continued substantially as at present.

(4) No increase in total fixed charges will result from the merger.

(5) The interest of carrier employees will not be affected by the merger since no material change in operation is involved and no employee is to be laid off by reason of the merger.

[fol. 395] (6) No guaranty or assumption of payment of dividends or fixed charges is contemplated by the merger.

2. *Also, if the proposed transaction involves a railroad:*

(1) The public interest will not be adversely affected by failure to include in the proposed merger other carriers in the territory involved since the Bridge Company is already controlled by the Big Four and the Central and its properties are now operated as a part of the Central's system.

(2) No railroad employee is to be laid off or otherwise adversely affected by reason of the proposed merger. There is, therefore, no need for imposing any conditions for protection of employees. Accordingly, applicants suggest that the Commission impose only such terms and conditions in that regard as may be required by the provisions of Section 5(2)(f) of the Interstate Commerce Act.

(3) Not applicable, no carrier by water being involved.

[fol. 396] WHEREFORE, the applicants pray that the Commission enter its order under Section 5 of the Interstate Commerce Act, as amended: (a) approving and authorizing the proposed transaction, including the merger of the properties and franchises of the Big Four and the Bridge Company into one corporation, namely, the Big Four, for the ownership, management and operation of the properties now in separate ownership, such merger to be effected by the merger into the Big Four of the Bridge Company

in the manner and upon the terms and conditions set forth in said Agreement of Merger dated September 14, 1954, and as provided in the foregoing application; (b) approving and authorizing the making of the proposed Confirmatory Supplemental Lease and the lease and operation of the properties of the Bridge Company by the Central as proposed, and the acquisition by the Central and Alleghany of control of the properties and franchises of the Bridge Company as proposed; (c) according the parties to the transaction all additional corporate powers granted by said Section 5, including full power to carry such transaction into effect; (d) authorizing the Big Four to own and operate, and authorizing the Central to operate, any and all properties and exercise any and all control and franchises acquired through said transaction, and authorizing the Central and Alleghany to exercise any and all control of the properties and franchises of the Bridge Company as proposed; all without invoking any approval under State authority; (e) relieving the applicants, their officers and employees, from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect said transaction, and enabling the applicants to own, hold, maintain, and operate all properties and exercise all control and franchises to be acquired by them, respectively, through said transaction, all to the fullest extent authorized and [fol. 397] provided by paragraph (11) of said Section 5; and (f) containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Louisville & Jeffersonville Bridge and Railroad Company, The New York Central Railroad Company, By: W. F. Place, Vice-President of each of said companies.

Alleghany Corporation, By: Thomas J. Deegan, Jr., Vice-President.

Dated: New York, N. Y., September 17, 1954.

[fol. 398] State of New York,
County of New York, ss.:

W. F. Place, being duly sworn, deposes and says that he is a Vice-President of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, of Louisville & Jeffersonville Bridge and Railroad Company and of The New York Central Railroad Company, applicants herein; that he has been duly designated and authorized by proper corporate action to verify and file with the Interstate Commerce Commission the foregoing application on the part of each of said applicants; that he has read said application; that he has carefully examined all the statements in said application; that he has knowledge of the matters therein set forth and that all of such statements made and matters set forth are true and correct to the best of his knowledge, information and belief.

W. F. Place.

Subscribed and sworn to before me this 17th day of September, 1954.

John F. Harley, Notary Public, State of New York, No. 30-1677050. Qualified in Nassau County. Certificates filed in Following offices: County Clerk: New York, Bronx, Register: New York, Bronx, Term expires March 30, 1955.

[Notarial Seal.]

[fol. 399] State of New York,
County of New York, ss.:

Thomas J. Deegan, Jr., being duly sworn, deposes and says that he is a Vice-President of Alleghany Corporation, applicant herein; that he has been duly designated and authorized by proper corporate action to verify and file with the Interstate Commerce Commission the foregoing application on the part of said applicant; that he has read said application; that he has carefully examined all of the statements in said application; that he has knowledge of the matters therein set forth and that all of such statements made and matters set forth are true and correct to the best of his knowledge, information and belief.

Thomas J. Deegan, Jr.

Subscribed and sworn to before me this 17th day of September, 1954, John F. Harley, Notary Public, State of New York, No. 30-1677050, Qualified in Nassau County, Certificates filed in Following offices: County Clerk: New York, Bronx, Register: New York, Bronx, Term expires March 30, 1955.

[Notarial Seal.]

[fol. 400] [File Endorsement Omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

REPLY OF ALLEGHANY CORPORATION TO PETITION OF S.E.C.—Filed October 14, 1954

Under date of September 14, 1954, the Securities & Exchange Commission (SEC) submitted a Memorandum to the Interstate Commerce Commission (ICC) "to suggest respectfully that the ICC terminate its Order of June 5, 1945 declaring Alleghany to be a carrier subject to certain provisions of the Interstate Commerce Act and to suggest further that the ICC in the exercise of its discretion decline to enter any new order declaring Alleghany to be a carrier subject to certain provisions of the Interstate Commerce Act." Subsequently the ICC permitted the SEC to intervene in the above dockets for the limited purpose of filing therein its Memorandum of September 14.

Alleghany asserts that adoption of the position set forth in the SEC Memorandum (1) would violate the Congressional intent in enacting Section 5(3) of the Interstate Commerce Act and Section 3(c)(9) of the Investment Com-

pany Act of 1940; (2) would result in action by the ICC inconsistent with its requests to Congress which led to enactment of Section 5(3); (3) would be contrary to the ICC's decision of June 5, 1945 in F.D. 14692; (4) would [fol. 401] lead to "conflict and confusion" between the ICC and the SEC; and (5) would severely hamper Alleghany, New York Central and its subsidiary and affiliated carriers in the issuance of securities and in their efforts to simplify the corporate structure, decrease costs of operation and increase efficiency. In support whereof, Alleghany shows the following:

I. The legislative history of Section 5(3) requires the ICC to consider Alleghany as a carrier.

As early as 1930, the House of Representatives, in response to the ICC's Annual Report for 1929, passed House Resolution No. 114 to investigate the ownership and control of stock and securities or capital interests of railroads by holding companies. The ICC report specifically mentioned Alleghany.

During this investigation, Commissioner Eastman, as Chairman of the legislative committee of the ICC, testified before the House Committee in support of the subjection of railroad holding companies to ICC jurisdiction.*

In its 1931 Annual Report, the ICC, after supporting the recommendations in the House Report on House Resolution 114, said: "We are also of the opinion that if a holding company is allowed to control a carrier by rail through ownership of stock, thereafter the accounts and capitalization of that holding company should be subject to regulation by the Commission."

[fol. 402] The ICC Annual Report for 1932 referred to its prior reports to Congress in connection with holding companies and to the bill submitted by it which provided in part that the ICC should have jurisdiction over the capitalization and power to regulate the accounting, to inspect the books and records of a railroad holding company, and to require reports from it.

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* House Report No. 2789, 71st Cong., 3rd Sess. (1931).

The House Report (No. 193, 73rd Cong., 1st Sess.) on S. 1580, which became the Emergency Transportation Act of 1933, contained Section 5(5) which is now (with changes in 1940 which are not material here) Section 5(3). This Report, after referring to House Resolution 114 and House Report 2789, stated that when a holding company is permitted to control a carrier by railroad directly or indirectly "thereafter the accounts and capitalization of that holding company *shall* be subject to regulation by the Commission." (Emphasis added.) It referred specifically to the paragraphs of the Act to which Alleghany is now subject as a carrier. This Report merely reflects the language of Section 5(3), the pertinent part of which provides as follows:

> "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter *shall*, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20(1) to (10), inclusive, of this part, * * * (which relate to reports, accounts, and so forth, of carriers), * * * and Section 20a(2) to (11), inclusive, (which relate to issues of securities and assumptions of liability of carriers) * * * ." (Emphasis added.)

[fol. 403] II. ICC decisions as well as ICC reports to Congress require that Alleghany be considered a carrier.

In 1945, the IC considered an application of The Chesapeake and Ohio Railway Company (C&O) to acquire control of the properties of the Norfolk Terminal Company, all of whose stock was owned by C&O and whose properties were under long-term lease to C&O. Alleghany joined in this application, seeking approval and authorization to control through Chesapeake and Ohio the properties of the Terminal Company. The ICC, in authorizing and approving Alleghany's control of the properties of the Terminal Company as part of the Chesapeake and Ohio, ordered that Alleghany be considered a carrier subject to

the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, in accordance with the requirements of Section 5(3) as set forth above.

Alleghany recently acquired control of the New York Central Railroad Company and the subsidiary carriers controlled by it. Alleghany's Chairman is now Chairman of the Central Board of Directors; its President is a member of the Central Board; and the slate of Directors nominated by Alleghany now constitutes the Central Board.* This Board has installed a new President, Secretary, two Vice Presidents, Chief Engineer, and Chief Mechanical Officer. Alleghany has an undivided one-half interest in 600,000 shares of New York Central with voting rights to [fol. 404] all 600,000 shares under joint venture agreements with Murchison Brothers and Sid Richardson. By these agreements Alleghany receives half of all profits on the sale of the 600,000 shares, is guaranteed against loss and is guaranteed 4½% interest on all money invested. Alleghany individually also owns 20,500 shares of New York Central. Its total voting rights represent approximately 10% of the total shares outstanding. Mr. Young and Mr. Kirby, the Chairman and President, respectively, of Alleghany together own 400,300 shares of Central which taken with Alleghany's voting rights equal approximately 16% of the total outstanding. In addition to Central, Alleghany has investments in Missouri Pacific at cost* in the following amounts: common stock, $31,032,312; bonds, $2,617,237; total, $33,649,549.

New York Central and Alleghany under date of September 17, 1954 filed with the ICC in F.D. 18656 an application seeking approval and authorization of control of the properties of the Louisville & Jeffersonville Bridge Com-

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*The Board selected Mr. Alfred E. Perlman as President and he has replaced Mr. Van Pelt on the Board.

*Alleghany, like all other carriers, reports its investments to the ICC on a cost basis pursuant to the ICC Uniform System of Accounts which recognizes this as the soundest basis for ICC regulation. Certainly Alleghany's status should not be determined by market price fluctuations which vary from day to day and month to month.

pany as part of the Big Four. Alleghany also requested that the ICC continue in effect its order considering Alleghany a carrier. This application and that which C&O and Alleghany filed in 1945 are in all pertinent and material respects identical. Therefore, consistency with the order of the ICC in F.D. 14692 of June 5, 1945 requires the ICC [fol. 405] to consider Alleghany a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive.

In summary, this Commission urged Congress to subject a holding company controlling a railroad (such as Alleghany which was specifically named in their reports to Congress) to regulation under the Interstate Commerce Act. Congress granted the ICC's request for legislation saying that when a holding company is authorized by an order to control a carrier by railroad such "holding company *shall* be subject to regulation by the Commission." Pursuant to this legislative mandate the ICC, in a factual situation in all material respects comparable to that which is now before it, held Alleghany to be a carrier. In comparable circumstances it has held other holding companies to be carriers.*

III. Failure of the ICC to consider Alleghany a carrier would lead to "conflict and confusion."

Congress passed the Investment Company Act in 1940, seven years after it enacted Section 5(3). It recognized that "conflict and confusion" might be expected to arise if companies and their subsidiaries were subjected to the jurisdiction of two different regulatory commissions and provided without qualification that "any company subject to regulation under the Interstate Commerce Act" would not be treated as an investment company. After the ICC decision authorizing Alleghany to control the Norfolk Terminal Company properties through the Chesapeake and [fol. 406] Ohio, the SEC by Order of October 5, 1945, held that Alleghany was exempt from the Investment Company Act because, by reason of its control of Chesapeake

* *Wabash Railroad Company Control*, 247 I.C.C. 365; *Shaver Forwarding Co. Purchase*, 260 I.C.C. 479.

and Ohio, it was subject to regulation under the Interstate Commerce Act and because Section 3(c)(9) of the Investment Company Act was intended to avoid the "conflict and confusion" which might be expected to arise if companies were subjected to the jurisdiction of two regulatory commissions.

It is apparent from the Investment Company Act, and in particular the provisions thereof cited in the SEC Memorandum, that unless the ICC continues to consider Alleghany a carrier, there will be "conflict and confusion" between the ICC and the SEC. The New York Central, its subsidiaries and Alleghany will be placed in the middle. The issuance or sale of securities or other properties, the borrowing of money by New York Central and its subsidiaries, as well as by Alleghany and all efforts of Alleghany, New York Central and its subsidiaries to effectuate economies by merger or consolidation, will be subject to the jurisdiction of both the SEC and the ICC.* Because of the unlimited scope of the definition of "affiliated person" contained in the Investment Company Act, it is difficult to predict with accuracy the furthermost extent of SEC jurisdiction over New York Central, its subsidiaries and Alleghany if the ICC were to terminate Alleghany's status as a carrier.

[fol. 407] Some indication of the problems that would arise are to be seen in the transactions referred to on pages 15 and 16 of the SEC Memorandum. There the SEC indicates that it would not have authorized the issuance and exchange of the 5% Sinking Fund Debenture Series A due November 1, 1962, as did the ICC by its Order of November 20, 1952 in F.D. 17937. The SEC says also that in any event, even if it had authorized such an exchange, it would have included different provisions and would not have

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* The conflict foreseen by Congress arises out of the statutes, for whereas Sections 17 and 25 of the Investment Company Act grant the SEC wide jurisdiction over mergers (if Alleghany is not exempt), Section 5(11) of the Interstate Commerce Act says ICC's authority in this field is exclusive and plenary.

permitted the issuance of warrants as did the ICC.* This and other transactions cited in its Memorandum reflect the SEC opinion that it alone can adequately regulate Alleghany despite the clear intent of Congress to vest regulation of companies such as Alleghany in the ICC.

The SEC claim of superior ability to regulate Alleghany is made despite the fact that, under regulation by ICC, Alleghany has vastly improved the net asset value per share of all issues of its stock. The net asset value per share of Alleghany prior preferred stock increased from less than $600 in 1945 to more than $1,840 on September 30, 1954. The net asset value per share of Alleghany's Series A preferred stock increased from approximately [fol. 408] $85 in 1945 to $330 on September 30, 1954. The equity for Alleghany's common stock rose from minus $60 million to plus $14 million (net asset value of over $3.00 per share) between 1945 and September 30, 1954. It is obvious from these figures that the interest of investors in Alleghany's securities has vastly improved under regulation by the Interstate Commerce Commission and the conflict and resulting confusion between the ICC and the SEC which Congress sought to prevent by Section 3(c)(9) has been avoided.

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* The SEC did not intervene by memorandum or otherwise in the proceedings before the ICC on the issuance of these debentures and warrants. Furthermore, the issuance of these debentures required that the Certificate of Incorporation of Alleghany be amended so as to permit the creation of this indebtedness; thus the approval of the stockholders was required. Since proxies were solicited for the aforesaid approval of stockholders, the proxy material was submitted to SEC for clearance. SEC, had it held the view it now expresses, could have required the inclusion of such views in the proxy material. See Rule X-14A-9. The exchange offer pursuant to which the warrants and debentures were issued was submitted to the SEC for comment. The SEC, had it held the view it now expresses, could have required the inclusion of such views in the proxy material. See Rule X-10B-5.

IV. Many of the specific points in the SEC Memorandum are in error.

The SEC argues at length that the change in the percentage of Alleghany investments from predominantly rail to predominantly non-rail securities affords a basis for concluding that Alleghany should no longer be considered a carrier. Nowhere in Section 5(3) of the Act is there any reference to such a criterion. The only criterion contained therein is that of *control* of a carrier. While from the legislative history the ICC might be justified in holding that a large industrial corporation controling a small carrier need not be considered as a carrier, the legislative history makes it very clear that a railroad holding company in control of a rail system of the size of New York Central "*shall*" be regulated under the Interstate Commerce Act.

In connection with the SEC argument respecting Alleghany's investment portfolio, it is interesting to note that the change took place gradually from 1945 to 1954. During this period, Alleghany reduced its investment in C&O, the large reductions occurring in 1946 and 1949. Similarly, five years have passed since Alleghany acquired its stock [fol. 409] in Investors Diversified Services which is asserted as another reason for the ICC to no longer consider Alleghany as a carrier. During this same period, Alleghany, as part of its program for improving the asset value of its securities, permitted holders of its preferred stocks to exchange their shares for stock in the Chesapeake and Ohio, Rock Island, and Kansas City Southern. This resulted in greatly improving the asset value of all of Alleghany's securities because its preferred stocks that were turned into Alleghany's treasury in exchange for railroad securities in its portfolio had large dividend accumulations which were thereby eliminated. Thus the change in Alleghany's portfolio is neither recent nor material to the present issue. However, Alleghany for months has been engaged in changing its investments back to rail securities. For instance, since August 31, 1954 it has acquired additional shares of New York Central at a cost of $181,707 and other rail securities at a cost of $1,766,346. As of this date its investments are 52% in rail securities, 15% non-

rail, 6% cash and U. S. Treasury bills, and 27% in notes receivable. Consistent with sound investment policy it will continue to divest itself of non-rail securities until they are reduced to less than 25% of Alleghany's total investments and it now expects to maintain not less than 75% of its security portfolio excluding government bonds in rail securities. Its re-investment program will be expedited upon the issuance in this proceeding of an order establishing new trustee arrangements for rail stocks outside the New York Central System. Thus Alleghany's investment portfolio will shortly contain predominantly rail securities. [fol. 410] The SEC says that Alleghany has engaged in certain transactions which, had Alleghany not been subject to regulation under the Interstate Commerce Act, would have been subject to regulation under the Investment Company Act and that such transactions "may have been contrary to the best interests of public investors of Alleghany." Alleghany asserts that its transactions have been in the best interests of its security holders and the comparative net asset value of its stock in 1940, 1945, and 1954 label the SEC's implication as false and misleading. The increased asset value behind its securities in 1954, as compared to 1945 when SEC regulation terminated, amply demonstrates that the best interests of public investors in Alleghany have been served by its officers under regulation by the ICC. In any event, Congress, in passing the Investment Company Act, stated that "any company subject to regulation under the Interstate Commerce Act" was exempt from the Investment Company Act. It did not say that companies subject to regulation under the Interstate Commerce Act would be exempt from regulation under the Investment Company Act only as to transactions that were subject to regulation under the Interstate Commerce Act, the SEC Memorandum to the contrary notwithstanding. The SEC seems to be attempting to rewrite Section 3(c)(9) of the Investment Company Act so as to increase its jurisdiction.

Many of the factual statements contained in the SEC Memorandum are inaccurate. For instance, it claims (page 3) that Alleghany in 1940 through Chesapeake Corporation exercised control of 9.1% of all steam railroads in

the United States, being the largest single railroad group in the country on a mileage basis. As this Commission [fol. 411] knows, this is not true. In 1940, Alleghany controlled the C&O, the Nickel Plate, the Pere Marquette and the Wheeling and Lake Erie, whose total railroad trackage was 7,480 miles or 3.22% of all steam railroads in the United States. By comparison, Alleghany now controls the New York Central System which is the second largest single railroad group in the country from the point of view of mileage or total operating revenues.

The following is a tabular comparison of the New York Central System with the Chesapeake and Ohio for 1953:

	NYC System** Incl. P. & L. E.	C. & O.	C&O of U. S.	NYC System of U. S.
Miles of Road	10,933.62	5,102.48	2.26%	4.85%
No. of Employees*	89,923	29,939	2.80%	8.40%
Operating Revenues:				
Freight (Acct. 101)	$651,478,131	$318,601,862	3.56%	7.28%
Passenger (Acct. 102)	117,974,578	8,240,614	0.98%	14.01%
Other	105,154,605	17,206,394	1.96%	11.99%
Total	$874,607,314	$344,048,870	3.23%	8.20%
Revenue ton-miles (thous.)	40,111,621	29,791,875	4.92%	6.62%
Passenger miles	3,762,043,647	271,682,663	0.86%	11.88%

* August 1954.
** New York Central & leased lines (B&A, Big 4, Michigan Central and P&E).

The SEC points out on page 3 of its Memorandum that on November 1, 1940, when Alleghany registered under the Investment Company Act, over 95% of its investments at then current market values were in rails and allied securities. It is clear from this that it was the ICC's 1945 Order approving Alleghany's control of C&O and the Terminal properties rather than Alleghany's investment portfolio that determined that ICC rather than SEC should regulate Alleghany. Furthermore, it is apparent from the state- [fol. 412] ments in the SEC Memorandum itself that the ICC continued to consider Alleghany a carrier even though Alleghany's investments radically changed after 1945. It was only when Alleghany relinquished control of the C&O that ICC issued its order to show cause why Alleghany's status as a carrier should be terminated. Since relinquish-

ing control of the C&O, Alleghany has gained control of New York Central and has filed a control application with the ICC under Section 5(2). It seems obvious that since control of a major rail system is the criterion determining the carrier status of a railroad holding company such as Alleghany rather than complete reliance on the percentage of its investment in rail securities at a particular moment, Alleghany should continue to be deemed a carrier pursuant to the provisions of Section 5(3).

The SEC Memorandum lays great emphasis on the stock ownership held by Alleghany in Investors Diversified Services (IDS). Several facts are of interest in this connection. First, the SEC now has complete jurisdiction over IDS under the Investment Company Act. Because of the comprehensive provisions of the Investment Company Act, the SEC has substantial control over the IDS stock in the Alleghany portfolio. Its own memorandum (page 6) shows there is no need for the SEC to have jurisdiction over Alleghany in order to regulate the affairs of IDS. Second, Alleghany acquired its IDS stock in 1949 at a cost of approximately $2,300,000. No memorandum was filed with the ICC asking the ICC to terminate Alleghany's status as a carrier until five years later by which time Alleghany had sold a substantial part of its stock in IDS and had greatly increased the value of the IDS stock by bringing to it the benefit of Alleghany's management and direction. [fol. 413] The SEC Memorandum argues that some of Alleghany's transactions would have been subject to regulation under the Investment Company Act had that Act been applicable to Alleghany. Alleghany does not dispute this, but this is merely to argue that there should be no exemption in the Investment Company Act and that Congress should repeal Section 3(c)(9) thereof. Until Congress takes such action, it is submitted that the argument of the SEC is fallacious.

The remainder of the Memorandum says in substance that the SEC would have done a better job than the ICC in regulating Alleghany, that the SEC would not have approved some of the transactions that the ICC approved, and that with respect to transactions upon which the ICC took no action the SEC might have taken action to approve

or disapprove.* The Memorandum argues that the SEC will do a better job in the future of regulating Alleghany than the ICC will do and that accordingly, the ICC should terminate Alleghany's status as a carrier. Regulation by the SEC is designed to protect the public investor in Alleghany. On the basis of the figures showing the unprecedented increase in the net asset value per share of all three classes of Alleghany stock and the other facts more fully set forth in Alleghany's 1953 Annual Report on file with the ICC, Alleghany submits that the position of public investors in its securities have not only been pro- [fol. 414] tected but vastly improved during the nine years that Alleghany has been subject to regulation by the ICC. It believes that this record testifies more loudly than words the success of ICC regulation. In the face of this record, SEC asks the ICC to ignore the clear requirement of Section 5(3) of the Interstate Commerce Act and its own successful administration of that section and declare Alleghany to be no longer a carrier subject to its regulation. The SEC asks the ICC to ignore the exclusive and plenary authority over Central and its subsidiaries granted ICC by Section 5(11) and asks the ICC to subject them and Alleghany to the conflicting jurisdiction of the SEC under the Investment Company Act.

Conclusion

As early as 1930, the Interstate Commerce Commission asked Congress to make railroad holding companies subject to regulation by it. In Section 5 of the Transportation Act of 1933, Congress gave the Commission jurisdiction over railroad holding companies specifically referring in the legislative history to Alleghany Corporation. The Act used the word *"shall"* be subject to regulation by the Commission in making the Act applicable to holding companies

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*There was, of course, nothing to prevent the SEC's filing with the ICC a memorandum in intervention or *amicus curiae* pointing out its views at the time these transactions occurred, just as they have done here.

that were granted authority to control one or more railroads by order of the ICC. In 1945, the ICC, in approving Alleghany's control of C&O as reconstituted to include the properties of the Norfolk Terminal, said Alleghany should be considered as a carrier. It did so without further discussion and by so doing indicated that as a matter of course Alleghany would be considered a carrier when authorized by order of the Commission to control a railroad. Alle-
[fol. 415] ghany's status as a carrier has continued for more than nine years. It is Alleghany's primary business and purpose to invest in railroad securities. It has now relinquished control of the C&O but has acquired control of the New York Central. It does not believe that statements by the SEC that it would have regulated Alleghany in a different manner, that it would not have approved some transactions that the ICC has approved, and that it will generally do a better job of regulating Alleghany than the ICC should be allowed to affect Alleghany's status as a carrier in the light of the clear language and clear intendment of Congress as set forth in the legislative history and as interpreted by this Commission in its prior decision.

Respectfully submitted, Alleghany Corporation, By (S.) Burton K. Wheeler, Edward K. Wheeler, Its Attorneys.

Washington, D. C., October 14, 1954.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fols. 416-417] CERTIFICATE OF SERVICE

(Omitted in printing)

[fol. 418] (File endorsement omitted)

BEFORE THE INTERSTATE COMMERCE COMMISSION

IN THE MATTER

of the

Application under Section 5(2) of the Interstate Commerce Act for an order approving and authorizing:

(1) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Louisville & Jeffersonville Bridge and Railroad Company to merge their properties and franchises;

(2) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, as lessor, and The New York Central Railroad Company, as lessee, to include the properties of Louisville & Jeffersonville Bridge and Railroad Company under their lease of January 2, 1930; and

(3) The New York Central Railroad Company and Alleghany Corporation to acquire, in view of their control of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, control of the properties and franchises of Louisville & Jeffersonville Bridge and Railroad Company.

Finance Docket No. 18656

SUPPLEMENTAL APPLICATION OF ALLEGHANY CORPORATION—
Filed December 6, 1954.

To The Interstate Commerce Commission:

This supplemental application is filed in response to the letter from the Director of the Bureau of Finance of November 22, 1954, addressed to Edward K. Wheeler, counsel for Alleghany, in which the following statements are made:

[fol. 419] "The application contains statements that Central and Alleghany join as parties for the

same reason that Alleghany (which formerly had a relationship with the Chesapeake & Ohio Railway Company, herein referred to as Chesapeake, in all respects the same as Alleghany's present relationship with Central) had joined in several applications filed by Chesapeake, including its request for authority to purchase the properties of the Norfolk Terminal & Transportation Company, Finance Docket No. 14692, decided June 5, 1945. On page 18, the present application shows that Big Four, the bridge company, and Central are members of a group of corporations known as the New York Central system: and that Alleghany controls Central, which is the system's parent railroad company.

"Finance Docket No. 18656, does not contain a request for authority for Alleghany, through Central, to control the carriers of the New York Central system. The applicants assert that the existing relationship of Alleghany to Central is similar in all respects with its former relationship to Chesapeake, as set forth in Finance Docket No. 14692. In view of this assertion may we assume that the present application is to be interpreted as including a request for Alleghany to be authorized to continue its control of Central and its subsidiaries. If this assumption is correct your application should be amended to include such a request."

In the application filed in this matter, it is shown at pages 18 and 28 that Alleghany controls The New York Central and its subsidiaries; that a change of existing control is involved because the Big Four would control the properties of the Bridge Company through merger instead of stock ownership; that the control by Alleghany and Central of the Bridge Company would likewise be changed; that such changes require the filing of an application under Section 5(2) and that Alleghany and Central are required to join in such application.

Since this is a transaction under Section 5(2) to which Alleghany is a necessary party, Alleghany asks for authority through Central to control the properties of the Bridge Company by merger with the Big Four instead of through

[fol. 420] ownership of its stock by the Big Four while continuing its control of the Central and its other subsidiaries and for such other authority as may be deemed requisite. Accordingly, there is submitted herewith in the attached Supplemental Exhibit the additional information requested in the Director's letter which is not already on file. The extent and method of control of each of the carrier corporations controlled by Central is contained in Central's annual reports to the Commission and in the application filed July 14, 1954 in Finance Docket No. 17591-Sub 2 by Alfred E. Perlman. It is requested that such information be incorporated herein by reference.

Additionally, in compliance with the last paragraph of the Director's letter, Alleghany sets forth below the most recent information as to its portfolio.

As of the close of business November 30, 1954, its portfolio at cost was as follows:

Rail	$48,008,801.17	67.76%
Non-rail	5,515,992.90	7.78
Cash	313,760.74	.44
Notes Receivable	17,016,540.90	24.02
Total	$70,855,095.71	100.00%

Transactions are now in progress which will reduce substantially Alleghany's non-rail investments.

Wherefore, it is respectfully requested that the application as supplemented herein be granted at the earliest pos-
[fol. 421] sible time so that Central and Alleghany may proceed with further measures to simplify the corporate structure of the Central System.

Respectfully submitted, Alleghany Corporation, By (S.) Burton K. Wheeler, Edward K. Wheeler, Its Counsel.

December 6, 1954.

Certificate of Service (Omitted in printing)

[fol. 422] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY, Purchase, etc.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

SUPPLEMENTAL MEMORANDUM OF SECURITIES AND EXCHANGE COMMISSION, DECEMBER 1, 1954—Filed December 20, 1954

The Securities and Exchange Commission ("SEC") submits this memorandum as a supplement to its Memorandum of September 14, 1954, heretofore authorized to be filed in this cause, in order to clarify several significant issues.

For the reasons set out in its prior Memorandum and elaborated herein, the SEC believes that the Interstate Commerce Commission ("ICC") is not required to continue to regulate Alleghany as a carrier, and that Alleghany as presently constituted should be subject to regulation under the Investment Company Act.

I. Neither Section 5(3) of the Interstate Commerce Act nor Prior ICC Decisions REQUIRE Continued Regulation of Alleghany as a Carrier

A. Section 5(3) of the Interstate Commerce Act provides only, as it has since its first enactment as part of the Emergency Transportation Act of 1933,[1] that a non-carrier entity which is authorized by an appropriate order of the ICC to acquire control of two or more carriers "shall, *to the extent provided by the Commission in such order,*" be [fol. 423] considered as a carrier subject to certain specified regulatory provisions applicable to any carrier acquiring such control. The above-emphasized clause of Section 5(3) specifically gives the ICC discretionary authority to

[1] 48 Stat. 211, 217-18 (1933). The section has continued in its present form since 1940; see 54 Stat. 899, 907.

decide to what extent, if any, such acquiring entity shall be deemed a carrier subject to said provisions, and has been so interpreted by the ICC.[2] Since the statute itself provides for such discretionary authority in clear and unambiguous terms, resort to legislative history in order to vary the plain meaning of the statute appears to be inapposite.

B. The legislative history of Section 5(3) and its predecessors, relied on by Alleghany in its reply (pp. 2-3), does not indicate that Congress, or even the ICC, intended that the ICC *must* consider all entities acquiring control of a carrier as carriers subject to the specified provisions of the Interstate Commerce Act, without regard to the character and activities of such entities. The first discussed draft of the bill which ultimately was enacted, H. R. 9059, contained the same discretionary clause as does Section 5(3) now.[3] Statements in House Report No. 193, 73d Cong., 1st Sess. (1933), and in the 1931 Annual Report of the ICC, relied on by Alleghany (Reply pp. 2-3), are not conclusions of Congress or of the Committee on Interstate and Foreign Commerce which prepared the Report, but a purported [fol. 424] restatement of the recommendations made to that Committee by its special counsel, Mr. Splawn, before any bill had been presented.[4]

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[2] *E.g., Warrier & Gulf Nav. Co. Control*, 250 I.C.C. 26, 31-32 (1941); *Pacific-Atlantic S.S. Co. Control.*, 250 I.C.C. 826 (1942).

[3] See Hearings on H. R. 9059, 72d Cong., 1st Sess. (1932), pp. 2, 31. The bill ultimately enacted by the following Congress, S. 1580 as amended by the House, was based on H. R. 9059, H. Rep. No. 193, 73d Cong., 1st Sess. (1933) at p. 15, and contained the same discretionary clause, *ibid.* at pp. 6, 16.

[4] H. Rep. No. 193, *supra*, stated on p. 19, after referring to H. Rep. 2789, 71st Cong., 3d Sess. (1931):

> "Incorporated in this report at page LXXXV were the recommendations of special counsel to the effect that section 5 of the Interstate Commerce Act, as amended, be amended so as to bring within the juris-

It is to be noted that, at that time, Congress and the ICC were concerned with the use of the railroad holding company device to evade the ICC's prior regulatory powers and to effectuate consolidation of railroad systems without regard to the public interest criteria of the Interstate Commerce Act. See H. Rep. No. 193, *supra*, at p. 20. It was in their character as *railroad holding companies*, not as *investment companies*, that these entities were then sought to be subjected to regulation. Alleghany, to be sure, was cited as a "striking illustration" of the inadequacy of the old Section 5 in coping with non-approved railroad consolidations via the holding company device,[5] but at that [fol. 425] time, unlike now, Alleghany was engaged almost exclusively in the transportation business by means of control of carriers whose securities constituted almost all of Alleghany's assets.[6]

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diction of the Interstate Commerce Commission, for approval or disapproval, any acquisition of the control of a railroad which would result in bringing that railroad into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding company or otherwise, [and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the Commission.]"

The recommendations as so stated were adopted verbatim by the ICC in its 1931 Annual Report (p. 121), but, in fact, the bracketed portion of the foregoing was not one of the recommendations of special counsel as listed on p. LXXXV of H. Rep. 2789, *supra*.

[5] This comment is taken from H. Rep. No. 193, *supra*, at p. 20, which refers to pp. 21-26 and 48-50 of Hearings on H. R. 9059, *supra*, n. 3, where some of Alleghany's activities were outlined.

[6] H. Rep. No. 2789, *supra*, p. 877 et seq., esp. pp. 878, 886-87, 898-99.

C. Since the 1945 ICC order, which subjected Alleghany to regulation as a carrier only "unless and until otherwise ordered by this Commission," expressly provided for the possibility of a future different ruling, it cannot operate as a legal bar to the reconsideration now urged even if the present factual situation were "in all material respects comparable" to that in 1945, which it is not. In and for some years prior to 1945 Alleghany was engaged only to a small extent in types of activity which Congress sought to regulate for the benefit of public investors in the Investment Company Act,[7] whereas more recently, as pointed out in the prior SEC Memorandum (pp. 7-9, 11-16), Alleghany has engaged in such activity to a much greater degree. On the other hand, in 1945 more of Alleghany's resources were committed to its engagement in the transportation business than are so committed now.[8]

[fol. 426] D. The ICC precedents cited by Alleghany do not support the proposition that the ICC must continue to regulate Alleghany as a carrier, as is shown by the following quotation from *Shaver Forwarding Company Purchase,* 260 I.C.C. 479, 495 (1945), one of the two cases relied on by Alleghany:

> "In the administration of the provisions of Section 5(3) of the act, we have given consideration in appro-

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[7] SEC records disclose that during the almost five years prior to October 1945, when Alleghany was registered under the Investment Company Act, it filed only one application and hence engaged in only one transaction requiring SEC consideration under that Act, *Alleghany Corporation,* 12 SEC 906 (1943). As shown in the prior SEC Memorandum (pp. 7-9, 13-16), in the past few years Alleghany engaged in a number of transactions which would have required SEC consideration had Alleghany been subject to the Investment Company Act.

[8] For example, in 1945 Alleghany had 38% of its assets (at market value) invested in common stock of a carrier controlled by it (C & O), *Alleghany Corporation,* 20 SEC 731, 736-37 (1945), while as at July 31, 1954, only 11% of its assets were so invested in New York Central.

priate cases to the *primary business or interests* of the noncarrier person therein authorized to acquire control of a carrier, or of two or more carriers. Thus we have exercised our plenary jurisdiction in the premises where the primary interest of the noncarrier is transportation, *Wabash R. Co. Control*, 247 I.C.C. 365 [this is the other decision relied on by Alleghany] and 252 I.C.C. 319, but where such primary interest was not transportation, but the production of steel, *Warrier & Gulf Nav. Co. Control*, 250 I.C.C. 26, or the production of lumber, *Pacific-Atlantic S.S. Co. Control*, 250 I.C.C. 826, we concluded that it was unnecessary to include in our orders any provisions subjecting the noncarriers to regulation under the Interstate Commerce Act in respect of reports, accounts, and so forth, of carriers, or of the issue of securities and assumption of liability of carriers" (emphasis added).

This quotation, on the contrary, shows that the ICC takes into consideration not merely control of a carrier, but the primary business or interests of the noncarrier which acquires control, and that the ICC has never taken a mandatory view of Section 5(3).

In summary, the ICC is not now foreclosed from the exercise of its discretion as to the status of Alleghany by Section 5(3) of the Interstate Commerce Act, by the legislative history of that section and its predecessors, or by prior ICC decisions.

II. *Regulation of Alleghany under the Investment Company Act Would Best Serve the Public Interest and Need Not Lead to any Conflict between SEC and ICC*

Since, as we have shown, the ICC does not have to continue to subject Alleghany to regulation as a carrier, whether Alleghany ought to be subject to the Interstate Commerce Act or to the Investment Company Act depends [fol. 427] largely on whether the nature of Alleghany's business activities place it primarily in the transportation or in the investment business. For the reasons stated in

its prior Memorandum, especially at pp. 4-7 and 9-13,[9] the SEC believes that Alleghany is now primarily in the business of an investment company, and that, therefore, public investors in Alleghany should be afforded the safeguards which Congress saw fit to establish for their benefit in the Investment Company Act.

This conclusion does not involve any assumption that the SEC would do a "better" job of regulating Alleghany than the ICC. The principal objectives as well as the scopes of the two Acts are different: The Interstate Commerce Act is concerned primarily with economic and sound operation of interstate carriers, the Investment Company Act with safeguarding public investors from the peculiar dangers, pointed up by past abuses, of certain practices of companies in the investment business.[10] Where, as here, a company is primarily in the investment business, public investors ought not to be deprived of these safeguards most of which are not contained in the Interstate Commerce Act. On the other hand, most of the here applicable objectives of that Act would be met by regulation under the Investment Company Act (prior SEC Memorandum, pp. 19-21).[11]

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[9] The SEC adheres to the figures on Alleghany's investments given in its prior Memorandum (p. 5). Alleghany's substantially different figures (Reply p. 10), apart from minor portfolio changes since July, 1954, are based on cost rather than present worth valuations (Reply p. 5). The SEC believes that any here meaningful analysis of Alleghany's investments must be founded on current market valuations rather than cost, as would, indeed, be required under the Investment Company Act [Section 2(a)(39)].

[10] See, *e.g.*, Section 1(b), Investment Company Act, 15 U.S.C.A. Section 80a-1(b).

[11] The different extent to which regulation under one Act would meet the objectives of the other is not referred to here as a criterion of general application. The SEC is not trying to broaden its jurisdiction or to "rewrite" Section 3(c)(9) of the Investment Company Act which exempts from SEC regulation under that Act a company subject to regulation under the Interstate Commerce Act. Where,

[fol. 428] As respects regulation of Alleghany there is no reason to assume that the ICC and SEC could not work out a non-conflicting *modus operandi* to secure the objectives prescribed by Congress for each agency insofar as these do not already overlap.[12] No claim is made that "conflict and confusion" between ICC and SEC existed during the period Alleghany was registered under the Investment Company Act when it also controlled rail carriers and was, if anything, more deeply engaged in the transportation business than it is now. Upon Alleghany's registration under the Investment Company Act the SEC, at the outset, could by rule or upon application generally exempt from regulation under Section 17 of that Act transactions involving solely carrier affiliates of Alleghany subject to regulation by the ICC.[13] There is only a remote possibility that a non-carrier affiliate of Alleghany would be involved in a merger or acquisition affecting two or more carriers, so as to bring into play pertinent provisions of both Acts. Hence as a practical matter only Alleghany's acquisition of control of another carrier involving an affiliated person might [fol. 429] bring into operation under certain circumstances both Section 5(2) of the Interstate Commerce Act and Section 17 of the Investment Company Act. In such an event the SEC would be concerned only with effects of the transaction on Alleghany and its non-carrier affiliates, while the

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however, as here, the ICC itself is considering whether to subject a company to regulation under the Interstate Commerce Act, and the company involved is preponderantly in the investment business but to some extent in that of transportation, the extent to which each statute protects different facets of the public interest is clearly relevant.

[12] Such a *modus operandi* now exists between the SEC and the Federal Power Commission with respect to certain acquisitions of utility assets by registered utility holding companies or their subsidiaries. Public Utility Holding Company Act, Sections 9, 10, 12, 15 U.S.C.A. 79i, j, l.

[13] For example, if such an exemption were in effect the SEC would not pass upon transactions of the character proposed in Finance Docket No. 18656.

ICC would be interested primarily in the effect on the acquired as well as the previously-controlled carriers. It is unreasonable to assume that the SEC would attempt to interfere with the plenary and exclusive jurisdiction over acquisitions of carriers as such which the ICC would still have by virtue of Sections 5(2) and 5(11) of the Interstate Commerce Act.

There is even less ground for apprehending a conflict because of Section 25 of the Investment Company Act. That section applies only to reorganizations (including mergers, consolidations, etc.) affecting the registered investment company itself. Subsection 25(a) merely requires the submission to the SEC of proxy-soliciting materials, as does Section 14 of the Securities Exchange Act of 1934 to which Alleghany has been subject and with which it has complied for many years. Subsection 25(b) merely *permits* the SEC to render an advisory report respecting the fairness of any proposed plan of reorganization, and subsection 25(a) *permits* the SEC to bring suit to enjoin a plan or reorganization if it is grossly unfair or involves gross misconduct or gross abuse of trust (in which case it would be inappropriate to assume that the ICC would pass it). Hence Section 25 contains no mandatory provision to which Alleghany is not already subject, and even its merely permissive provisions could not apply to reorganizations not affecting Alleghany itself.

[fol. 430] The foregoing shows that the ICC would retain exclusive federal jurisdiction over carriers owned or controlled by Alleghany, except insofar as certain transactions in the property or securities of such carriers may involve Alleghany or its non-carrier affiliates, and that even with respect to such transactions, conflict between SEC and ICC is not only not inevitable but unlikely, and can be avoided altogether by appropriate use of statutory powers.

In passing we comment briefly on certain allegations made by Alleghany in its reply filed in these proceedings on October 14, 1954.

In stating that some of Alleghany's more recent transactions, which would have been subject to regulation under the Investment Company Act but were not subject to regulation under the Interstate Commerce Act, "may have been

contrary to the best interests of public investors in Alleghany," the SEC did not assert that such transactions were in fact contrary to such interests, but merely that these transactions involved aspects of investor public interest which Congress intended to be subjected to appropriate scrutiny.[14]

Alleghany's assertion that its "*investment* portfolio will shortly contain predominantly rail securities" (Reply p. 10, emphasis supplied), apart from improperly asking the ICC to make its decision now on the basis of some hypothetical future situation, has little bearing on how Alleghany [fol. 431] should be regulated. So long as these security holdings are too small to involve control, or are placed in trust so as to isolate them from control by Alleghany, they are clearly being held as investments, and as to such holdings Alleghany would remain in the position of an investment company, not that of a carrier. In addition, as shown in the prior SEC Memorandum, Alleghany remains heavily in the investment company business through its holdings in and control over the largest group of investment companies in the world.[15]

Conclusion

The question before the ICC is whether Alleghany as presently constituted should continue to be subject to regu-

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[14] So long as the ICC continued to subject Alleghany to regulation as a carrier and did not reopen that question for reconsideration, as it has now, the SEC felt itself precluded from applying to Alleghany's transactions the requirements of the Investment Company Act and from intervening in ICC proceedings involving such transactions.

[15] In the interest of brevity and to keep the argument here confined to relevant and material matters, certain allegations of Alleghany as to the inaccuracy of figures used by the SEC in respect of Alleghany's 1940 carrier holdings (Reply p. 12) will not be specifically refuted [but cf. 4 Report of the SEC, *Investment Trusts and Investment Companies* 113 (1942)], especially since Alleghany admits that in 1940, when it registered under the Investment Company Act, 95% of its securities were in rails and it then controlled at least four railroads (Reply p. 12).

lation as a carrier as authorized by Section 5(3) of the Interstate Commerce Act. The statute, legislative history, and precedents do not require continuance of such regulation. The SEC believes that Alleghany is now preponderantly engaged in the business of an investment company, and that therefore its public investors should be afforded the protections of the Investment Company Act. Regulation under that Act would meet most of the pertinent objectives of the Interstate Commerce Act and need not involve conflicts between SEC and ICC. Under these circumstances the public interest would be served best by the ICC's refusal to continue to subject Alleghany to regulation under the Interstate Commerce Act.

Respectfully submitted, William H. Timbers, General Counsel.

December 14, 1954.

[fol. 432] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY, Purchase, etc.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

REPY OF ALLEGHANY CORPORATION TO SUPPLEMENTAL MEMORANDUM OF SECURITIES AND EXCHANGE COMMISSION—filed December 31, 1954

The Supplemental Memorandum of the SEC is in reality a reply to the Reply of Alleghany Corporation to the SEC's first Memorandum. It is divided into two parts, the first part urges that the ICC *is not required* by Section 5(3) of the Act or prior decisions of the Commission to continue to regulate Alleghany as a carrier. It suggests at the top of page 2 that the ICC ignore the intent of Congress in enacting Section 5(3) just as the SEC in both of its memo-

randums ignores the intent of Congress in enacting Section 3(c)(9) of the Investment Company Act. It further suggests that the ICC ignore its own reports to Congress and that of Special Counsel Splawn to the Committee on Interstate and Foreign Commerce resulting from an investigation of the stock ownership of railroads by corporations organized as trading, investment or holding companies. These reports led to the enactment of Section 5(3). Mr. Walter Splawn, after diligently and faithfully serving the House of Representatives for years, became a distinguished member of this Commission. The SEC further says that when these ICC and Congressional reports re-
[fol. 433] ferred to Alleghany as one of the companies that "shall" be subject to regulation by the ICC, it was in its character as a railroad holding company, not as an investment company, that Alleghany was to be regulated. This assumes contrary to the Congressional reports that Alleghany is no longer a holding company. The Splawn report dealt extensively with the distinction between an investment company and a railroad holding company. It pointed out that an investment company "by definition assumes none of the responsibilities of management and control of the companies whose securities it holds."* The holding company on the other hand was stated to be a company which not only invested in railroads but exercised control of them. The recommendations leading to the enactment of Section 5(3) recognized this distinction.** Congress was not interested in regulating investment companies that merely held railroad securities and nothing more. It was interested in and prescribed regulation by the ICC of the companies which *controlled* one or more railroads. The SEC infers that Alleghany has become an investment rather than a holding company and therefore the ICC should not regulate Alleghany. The reports of Congress show beyond challenge that Alleghany was then by virtue of its control of the Chesapeake & Ohio and is now by virtue

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* House Report 2789, 71st Cong., 3rd Sess. 1931, p. 1690.

** House Report 2789, pp. X, XI, XXVI, XXXI, 1735, 1736.

of its control of New York Central a holding company which "shall" be regulated by the ICC.

[fol. 434] It was *control* of a large operating railroad or railroads that caused the ICC to recommend and Congress to enact Section 5(3). Both the ICC and the House Reports recognized that holding companies "may be used to control non-carrier companies"* and "do not confine their holdings to railroad securities." In fact, the ICC noted control by a company controlling a railroad of non-carrier companies as a reason for regulating the railroad holding company.** It is thus obvious that the presence or absence of non-carrier investments cannot determine Alleghany's status as a carrier. The determining fact is whether it controls one or more major railroads. We again reiterate that in the face of this plain intent expressed in the ICC reports to Congress asking it to subject companies *controlling* large railroads to its regulation, the reports of Congress on this subject which led to the enactment of Section 5(3) and the specific references to Alleghany, it would be tantamount to an abuse of discretion for the ICC to discontinue regulation of Alleghany so long as it controls the New York Central.

In order to make its continuing intent that the ICC should regulate railroad holding companies, Congress in enacting the Investment Company Act of 1940 specifically provided that those companies (i.e., railroad holding companies) subject to regulation under the Interstate Commerce Act should [fol. 435] be exempt from the Investment Act. The legislative history of these two Acts permits of no other conclusion.*

In what is putting really only a different face on the same argument, the SEC urges the ICC to ignore its prior deci-

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* *Ibid.*, pp. IX, XXVI.

** *Ibid.*, p. IX.

* As everyone familiar with Congress is aware, it has had great faith in the administration of the Interstate Commerce Commission, the oldest of all administrative agencies. It would have been strange indeed had Congress preferred the new SEC to the ICC in a confliet of jurisdictions involving a company controlling a large railroad.

sions on the ground that Alleghany now has a somewhat lesser amount of its funds at market value invested in rail securities than it did in 1945. As Alleghany has previously stated in recent reports to the Commission, it is rapidly changing the composition of its investments. It has been engaged in selling its non-rail investments and investing in rail securities, principally the common stock of the New York Central Railroad.** It has told the Commission that once this program is completed it intends to keep 75% or more of its investments at cost in rail as against non-rail securities. Its progress in the sale of its non-rail securities was delayed by the objections raised by the SEC to a transaction which would have resulted in the sale of a large block of its stock in Investors Diversified Services. It told the SEC that one of the primary reasons for this sale was to meet the SEC's objection to its continued regulation by ICC and requested a required waiver. The SEC staff indicated that such a waiver would be difficult to obtain and [fol. 436] there would be considerable delay in obtaining it. The SEC thus has not, in Alleghany's view, been wholly cooperative in Alleghany's effort to sell off its non-rail investments, the continued holding of which the SEC urges as a basis for ICC overruling its prior decisions. The least that Alleghany expected was that the SEC would not immediately thereafter urge that in order to continue its status as a carrier Alleghany should dispose of its investment in I.D.S.

The SEC also argues that Alleghany should be subjected to the Investment Company Act now because it is presently more active than it was a few years ago. So far as we have been able to determine, Congress did not establish as a criterion for determining status, the amount of total activity in which a corporation happened to be engaged in a particular year.

Alleghany was intended by its organizers to operate as a railroad holding company; through its considerable history it has operated as a railroad holding company; and

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** In addition to the one-half interest in 600,000 shares in a joint venture Alleghany now owns 286,000 shares of Central.

its management reiterates that in the future it will continue to operate as a railroad holding company. Alleghany has not, however, in the past, rigorously excluded all possibility of investment in non-rail securities, irrespective of the circumstances and opportunities for non-rail investment.* From time to time, therefore, Alleghany has had invest- [fol. 437] ments in non-rail securities, and there has naturally been a fluctuation over the years in the percentage of rail versus non-rail securities.

What the SEC now does is to select with care two periods in the fluctuations of Alleghany's business transactions which are most favorable to its view that Alleghany has been transmuted from a railroad holding company into an investment company. It so happens that the relatively small investment in I.D.S., made by Alleghany in 1949, had grown by mid-1954 under Alleghany's management to one of considerable value. It so happens that in 1940 Alleghany was invested substantially in rail securities. The SEC thus selects a date in 1940 and in mid-1954 to draw a comparison between Alleghany's holdings in rail and non-rail securities. It ignores both the fact that Alleghany, in pursuit of its historic intention to operate fundamentally as a railroad holding company, has for some months been reducing substantially its holding in non-rail securities and the clear legislative history showing that such holdings cannot be determinative of its status.

This narrow view which SEC invites ICC to take, focusing on Alleghany holdings at carefully selected dates and [fol. 438] ignoring its history, must be rejected.* The ICC

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* As pointed out, *supra*, p. 3, Congress recognized in passing Section 5(3) of the Interstate Commerce Act that railroad holding companies do have non-rail investments. The Van Sweringen holding companies, of which Alleghany was one, were listed as among those holding companies which did not confine its holdings to rail securities.

* There are anomolies in the view SEC urges. Had Alleghany's investment in I.D.S. proven improvident, SEC would have no basis for its present contention since Alleghany's percentage of rail to non-rail securities would be far greater. It should obviously be investment cost—not

has had a long experience and concern with Alleghany affairs, and is well aware that Alleghany's fundamental concern has been and will remain in the railroad field. This was never more true than at the present time when Alleghany has recently acquired control of the nation's second largest railroad.

In summary, we believe the problem can be resolved along simple lines. The SEC has a generalized jurisdiction over all investment companies of many types and characters. The ICC has a particularized jurisdiction over only those investment companies which are railroad management companies. When it is found, as it must be, that Alleghany controls the second largest railroad system, the question as to which agency shall regulate Alleghany virtually answers itself. The ICC, with seven decades of experience in handling railroad problems, has the experience and expertise necessary for regulation of a railroad management company's affairs. It would be an absurdity for the qualified and specialized agency to hand over juris- [fol. 439] diction in its special field of competence at the behest of another agency having a generalized jurisdiction.

The SEC Memorandum says that precedents cited by Alleghany do not support continuation of regulation of Alleghany as a carrier. They quote from the *Shaver Forwarding Company Purchase* case, 260 ICC 479, 495 (1945). Neither this case nor the quotation detracts in the slightest

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how well the investment turns out—which determines the fundamental intention of Alleghany's management in its operations.

Furthermore, were the SEC view adopted, Alleghany might be swinging back and forth between SEC and ICC regulation depending on month-to-month market fluctuations. All would depend on the market value of its rail versus non-rail investments. SEC would have Alleghany now subject to its regulation because the value of its I.D.S. investment has grown so large. Should I.D.S. collapse, presumably Alleghany would revert to ICC; should I.D.S. recover, Alleghany would swing back to SEC. Investors would, in the last analysis, determine the appropriate regulatory agency.

from Alleghany's prior argument or position in this case. To the contrary, it is a strong precedent for continuation of Alleghany's status. Alleghany has always admitted that this Commission has not considered large steel companies, lumber companies, paper companies, etc. that owned a small carrier as carriers subject to Section 5(3) of the Interstate Commerce Act. However, Alleghany has said and still says that under the Act the ICC must consider corporations, and in particular Alleghany, that control the largest rail systems in the country, to be carriers under Section 5(3). The ICC in the *Shaver* case held Youell, Inc. subject to Section 5(3) even though, as it stated, "This concern's investment in carriers comprises a relatively small part of its total interests." Thus this case is dispositive of the erroneous SEC contention that a company (Alleghany), even though active in the management of carriers, should not be subject to regulation under Section 5(3) if it has interests in non-carrier concerns.

The last half of the Supplemental Memorandum is an attempt to show that there would be no clash between the ICC and the SEC if Alleghany were regulated by the SEC under the Investment Company Act. The very complexity [fol. 440] of this argument demonstrates its weakness. Anyone who attempts to follow the SEC through the intricacies of its argument immediately becomes aware of the reasons Congress included in the Investment Company Act Section 3(c)(9) exempting those subject to regulation by the ICC from the Investment Company Act. There would be constant conflict and confusion between the SEC and the ICC, and Alleghany would be squarely in the middle of a constant jurisdictional squabble. It would never know where it stood with respect to any corporate action.

The SEC Memorandum should not be addressed to this Commission. Rather it should be included in their annual report to Congress accompanied by a request that Section 3(c)(9) of the Investment Company Act and Section 5(3) of the Interstate Commerce Act be repealed. It has no probative value so long as these sections remain on the statute books.

During the course of this discussion SEC says it is unreasonable to assume that it would attempt to interfere

with the jurisdiction of the ICC. Yet in its prior memorandum it freely condemned the ICC's action in approving the issuance of debentures by Alleghany in 1952, Finance Docket 17937. Even the words, such as "affecting," employed by the SEC throughout this section of their memorandum show the confusion that would result. Just what the word "affecting" means has been the subject of endless litigation. Neither Alleghany, the companies controlled by it, its subsidiaries, persons affiliated with it, or companies with which it might seek to transact business, would ever know whether the transaction involved was one "affecting" them.

[fol. 441] Alleghany pointed out in its reply to the original SEC Memorandum that the SEC is free at all times to intervene in all proceedings before the Interstate Commerce Commission with respect to Alleghany's transactions and to point out its view of the effect of each transaction on the public investors in Alleghany if it believes the ICC will not consider their interest in passing upon the matter before them. In reply to this, the SEC states in two footnotes (footnote 11, p. 6; footnote 14, p. 9) that so long as the ICC continued to regulate Alleghany it felt itself precluded from intervening in ICC proceedings involving Alleghany's transaction and only intervened here because the ICC decided to consider whether to continue to subject Alleghany to regulation under the Act. In view of the fact that the SEC insistently urged the reconsideration of Alleghany's status as a carrier consistent with the feelings stated in its footnotes, it should have felt itself precluded from intervening in the present proceedings. Otherwise it is engaging in bootstrap elevation.

Alleghany questions the accuracy of the self-abnegating statements of the SEC to the general effect that, so long as the ICC determined that Alleghany was to be deemed a carrier and until the ICC chose of its own motion to reopen the question of Alleghany's status as a carrier, the SEC felt itself precluded from applying the requirements of the Investment Company Act to Alleghany or from seeking intervention in ICC proceedings involving Alleghany. As the ICC well knows, since the advent of the new Chairman of the SEC and the new Director of the Division of

Corporate Regulation, the SEC has made repeated and insistent requests to the ICC and its staff to discontinue Alleghany's status as a carrier.

[fol. 442] We hope that by its successful efforts to unseat the old board of directors of Central and its advocacy of continuation by the SEC of its competitive bidding rule Alleghany has not aroused enmities prejudicial to it.

As Alleghany stated before, it believes the vast improvement in the status of Alleghany's security holders since 1945 testifies to the effectiveness of ICC regulation in not only protecting but furthering the interests of the public investors in Alleghany whose interests alone the SEC would protect if it acquired jurisdiction over Alleghany. It further believes that anything further required in the interest of its public investors can be more than adequately supplied through intervention by the SEC in proceedings before the Commission on transactions proposed by Alleghany. Alleghany controls the second largest rail system in the United States. It has invested millions of dollars in its securities. It will invest more. It has other millions of dollars invested in other rail securities and it will make further such investments. It will continue to reduce its now relatively small holdings in non-rail companies and has such further reductions in prospect at the present time. It will continue its divestment of non-rail investments as fast as the best interests of its security holders and the SEC will permit. As of December 31, 1954 Alleghany's investments in non-rail securities at cost constituted only 6.45% of its portfolio.

In conclusion, Alleghany requests this Commission to disregard as highly improper the effort of the SEC to first [fol. 443] have the ICC instigate a proceeding and then use that proceeding as the sole basis for intervention when but for the existence of that proceeding the SEC, by its own admission, would have felt precluded from challenging Alleghany's status and its transactions. Financial transactions of the greatest import to Alleghany and to New York Central are being delayed, and both corporations and their security holders thereby are being prejudiced because the applications and requests of New York Central and Alleghany have not been granted. Alleghany re-

spectfully requests that this Commission grant the application in these dockets at the earliest possible time.

Respectfully submitted, Alleghany Corporation, By Burton K. Wheeler, Edward K. Wheeler, Its Counsel.

December 31, 1954.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 444] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 445] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket 18656

PETITION OF LEWIS D. GILBERT, ET AL. FOR LEAVE TO INTERVENE—filed January 11, 1955

Come now your petitioners, Lewis D. Gilbert and John Gilbert, by their attorney and respectfully represent that they have an interest in the matters in controversy in the above entitled proceeding and desire to intervene and become parties thereto. For grounds of intervention, the petitioners say:

I. That the petitioners are independent investors and stockholders in the Alleghany Corporation and the New York Central Railroad Company, with their address at 1165 Park Avenue, New York 28, New York.

II. That the application by Alleghany Corporation pending in this proceeding has been filed by Alle-

ghany in an effort to avoid regulation by the Securities and Exchange Commission in accordance with the Investment Company Act, an act intended for the protection of both investors in investment companies, such as Alleghany Corporation, and investors in companies, such as the New York Central Railroad Company, whose securities may be acquired, and whose affairs may be dominated by an investment company.

III. That the question of whether Alleghany Corporation is to be subject to the regulation of the Interstate Commerce Commission or the Securities and Exchange Commission has been raised by the Securities and Exchange Commission in its memorandum dated September 14, 1954, and is at issue in this proceeding; and that the resolution of this issue is of great importance to petitioners and all other investors in Alleghany Corporation.

IV. That the question of control of the New York Central Railroad Company by Alleghany Corporation is, or may be, at issue in this proceeding and that the resolution of this issue is of great importance to petitioners and all other investors in the New York Central Railroad Company.

Wherefore, the petitioners pray that the Commission grant them leave to intervene in and file the accompanying motion to dismiss the application as to Alleghany Corporation for want of jurisdiction, and the accompanying motion to deny the application as to Alleghany Corporation if the Commission takes jurisdiction, and to be treated as parties hereto with the right to have notice of and appear at any hearing or other proceedings that may be had herein, to take testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief or oral argument, and that the petitioners have such other and further relief as in the premises may be proper. Oral argument is requested.

Respectfully Submitted, Joseph B. Hyman, Attorney for Petitioners, 211 South Pitt Street, Alexandria, Virginia.

[fol. 446] MOTION TO DISMISS FOR WANT OF JURISDICTION

Motion of Lewis D. and John Gilbert to Dismiss for Want of Jurisdiction the Application of Alleghany Corporation for Control of the Properties and Franchises of the Louisville & Jeffersonville Bridge & Railroad Company or of the New York Central Railroad Company and/or any of its constituent companies.

Come now Lewis D. and John Gilbert, stockholders in both the Alleghany Corporation and the New York Central Railroad Company, by their attorney and respectfully move the Commission to dismiss for want of jurisdiction the application of Alleghany Corporation in this proceeding for control of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company or of the New York Central Railroad Company and/or any of its constituent companies.

Your petitioners submit the following statement in support of this motion.

Statement

I. As to Alleghany and the Louisville & Jeffersonville Bridge Company

Alleghany has no franchises or properties which are being merged with those of the Bridge Company. Section 5(2)(a)(i) of the Interstate Commerce Act requires Commission approval "for two or more carriers to consolidate or merge their properties or franchises, or any part thereof." Only by a tortured construction could it be held that this language applies to Alleghany in such a way as to give it standing in this proceeding. Properly speaking the Bridge Company and the Big Four are merging properties and franchises; more remotely this is also true of the Bridge Company and the New York Central Railroad Company. Alleghany, however, is no carrier within the meaning of Section 5(2)(a)(i); has no franchises or physical properties of the kind contemplated by the Act; and is merging nothing with the Bridge Company. Alleghany, consequently, is not a valid party to this proposed intrasystem merger of franchises and properties and its insistence on being recognized as one is no more than a

maneuver to enable it to escape the control of the Investment Company Act and the Securities Exchange Commission.

Moreover the doctrine of United States v. Marshall Transport Company, 322 U.S. 31, does not apply to a situation such as the one presented here. Alleghany through its admitted control of the New York Central Railroad Company already controls the Bridge Company. That control will still be an indirect one, though less remote by one degree. The proposed transaction gives Alleghany control over nothing not already in its orbit. Accordingly there seems to be no need for Alleghany to appear as a party to the intra-system merger here presented for approval.

Alleghany cites as a precedent the proceeding in Chesapeake & Ohio Railway Company Purchase, 261 ICC 239, involving a merger of properties within the Chesapeake & Ohio system. The subsidiary there involved was the Norfolk Transportation & Terminal Company and it should be pointed out that the Commission's order in that proceeding did not deal with Alleghany's control of the prop- [fol. 447] erties of the Norfolk Company but only with its control of the Chesapeake & Ohio, the Pere Marquette and the Nickel Plate. The clear inference is that the order in the present proceeding, insofar as it is concerned with the Bridge Company, need not involve Alleghany.

Counsel for Alleghany appear to urge as their ground for making Alleghany a party to this proceeding so far as it relates to the properties of the Bridge Company that Alleghany is now seeking control of the Bridge Company in addition to its admitted control of the Bridge Company's parent, the New York Central Railroad Company. Such a construction would make this an application by a person "which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise." This argument is absurd on its face. Alleghany in its application admits its present control of the New York Central and its constituent companies, including specifically the Bridge Company. This statement of position has been underlined by the letter of Alleghany's counsel to the Commission, under date of December 15, 1954, declining to apply for

control of the Central itself. If Alleghany controls the Central and needs no authority to keep that control, it must control the Bridge Company as well. In the circumstances this proceeding so far as Alleghany is concerned is empty and without point and could give it nothing not already in its hands.

If Alleghany for technical reasons must be a formal party to the merger of the franchises and properties of New York Central system companies, it should not be allowed to use such a merger proceeding as this as a means for getting an order from this Commission behind which to shield itself from lawful regulation under the Investment Company Act.

II. As to Alleghany and the New York Central Railroad Company

Alleghany Corporation is a noncarrier corporation, or more precisely, to use the language of Section 5(2)(2)(1) of the Interstate Commerce Act, "a person which is not a carrier."

Section 5 of the Act confers jurisdiction over acquisitions of control of carriers by such persons only if such person is acquiring "control of two or more carriers," or if, having control of one carrier, it seeks to acquire control of another.

While Alleghany Corporation by the Commission's order of June 5, 1945 was allowed to control the Chesapeake & Ohio Railway Company, the Pere Marquette Railway Company, and the New York, Chicago & St. Louis Railroad Company, better known as the Nickel Plate, it has according to its own counsel since disposed of the control of those carriers.* The Chesapeake & Ohio Railway Company since 1945 has merged with the Pere Marquette; it has distributed its holdings of Nickel Plate to its own stockholders; and Alleghany, itself, has informed the Com-

* This motion to dismiss is premised upon the truth of Alleghany's allegation—as yet unproved—that it does not still control the Chesapeake & Ohio Railway Company by secret agreements or otherwise.

mission that as of January 19, 1954 it had disposed of the last of its holdings of Chesapeake & Ohio shares to Mr. Cyrus Eaton of Cleveland, Ohio.

Alleghany has in fact informed the Commission through its counsel that it no longer has any interest in the Chesapeake & Ohio and that, having made that divestment, it exercised control of no carrier subject to the Interstate Commerce Act. Its counsel, Mr. Burton K. Wheeler, wrote to the Commission at considerable length on this point on January 28, 1954:

> [fol. 448] "Alleghany, Young and Kirby have by the actions above outlined completely divested themselves of control of the Chesapeake & Ohio. Since Alleghany no longer exercises the permissive authority to control the Chesapeake & Ohio granted by the Commission in its Order of June 5, 1945 and since Alleghany exercises control of no other carrier subject to the Interstate Commerce Act, we have advised Alleghany Corporation, Mr. Young and Mr. Kirby that the express conditions numbered 1, 2 and 3 as set forth on sheet 22 of the Commission's Report and Order no longer are applicable to them and that Alleghany is, therefore, free to acquire stock ownership in or control of another carrier, and Messrs. Young and Kirby and other Alleghany officers or directors are free to accept or seek directorships of another carrier. The Pittston stock owned by Alleghany will be continued under the present voting trust with the Empire Trust Co. until Pittston disposes of its stock in United States Trucking Corporation."
>
> "The Commission's 1945 Order prescribed the conditions under which, alone, it would permit Alleghany to control Chesapeake & Ohio, but the Order did not purpose to go further and prescribe absolute requirements which would be binding upon Alleghany, its officers, and directors at all times thenceforth, entirely apart from its control of Chesapeake & Ohio. The conditions surrounding the authorization of Alleghany to control Chesapeake & Ohio depended upon continued control of Chesapeake & Ohio. They were coextensive in time with such control and did not endure

after Alleghany ceased to exercise the authority granted it by the Order. It seems self-evident that, once Alleghany and Messrs. Young and Kirby, ceased to exercise the authority thus granted, they were no longer required to conform to conditions which, in their origin and nature, were simply the conditions under which they might exercise the authority.

We believe that the opinion rendered by us to Alleghany and Messrs. Young and Kirby is not only sound but is also quite beyond the possibility of controversy or dissent."

Accordingly, assuming the divestment of Chesapeake & Ohio shares to have been finally and irrevocably made by Alleghany Corporation, and that Alleghany does not now control any carrier other than the New York Central Railroad, as alleged by the pending application, Alleghany's position is that of "a person which is not a carrier" seeking control of a single carrier, namely the New York Central. A plain reading of the Act leads to the conclusion that it is not unlawful for Alleghany to take control of a single carrier, and that in the circumstances the application is not only unnecessary but that the Commission has no jurisdiction to act upon it.

It may be asserted that because of the complexity of the New York Central System, with its numerous constituent companies, Alleghany is here asking for permission to control two or more carriers. That contention was dealt with and dismissed by Alleghany's counsel in this proceeding in a letter addressed to the Commission on April 16, 1954. The issue of the legality of the acquisition of control of New York Central by the Alleghany slate of directors having been raised by counsel for the New York Central, Alleghany's counsel wrote with considerable authority:

"As one of the sponsors of the Transportation Act of 1940 and a member of the Senate Interstate Commerce Committee for over 20 years, I can assure you that the interpretation placed on Section 5 by the New York Central petition is not the interpretation intended by Congress when it passed the Transportation Act of 1940. Nor was it the interpretation placed

on Section 5 by Congress in enacting that section on and after 1923. The Congress did not deem the ac- [fol. 449] quisition of a single railroad carrier system (by a person not a carrier or in control of a carrier) as a transaction within the meaning of Section 5. Thus where a principal carrier controlled subsidiary carriers which were part of a railroad system and such control was acquired in accordance with law, the subsequent acquisition of control of the principal carrier with its subsidiary was not intended to be a transaction as that term is used in Section 5. Furthermore the Commission itself over a long period of years has so interpreted Section 5 insofar as rail carriers are concerned."

"As I have previously stated, it was never the intention of Congress to apply Section 5 to a carrier and its controlled subsidiaries which form part of a system, unless acquisition of new and additional carriers or subsidiaries are involved. The Commission obviously has for many years agreed with this view. Any other view would create a chaotic condition which was not intended by Congress and would be detrimental to the public interest and the interest of a sound transportation system."

These views seem to have the support of both precedent and logic. Moreover the Commission evidently accepted them at the time—however tacitly.

If, however, it were to be held at this time that the New York Central Railroad is in fact not one carrier but a congery of carrier companies, as will be seen in the petitioners' Motion to Deny, filed this day, the Commission could not grant Alleghany's application for control of the New York Central Railroad Company.

It may, of course, be asserted that the Commission has jurisdiction over the pending application because Alleghany, by virtue of the order of June 5, 1945, became and remains a carrier, and is consequently a carrier seeking approval of control of one or more additional carriers. Section 5(3) of the Act, however, brought Alleghany under the Interstate Commerce Act only to the extent of making

applicable to it Section 20 (1) to (10) inclusive and Section 20a (2) to (11) inclusive. The operation of Section 5 (3) did not make Alleghany a carrier for general purposes and the order of June 5, 1945 did not consequently transform Alleghany into a carrier for the purposes of Section 5(2)(a)(i), thereby establishing jurisdiction in the Commission over the present application. Had it done so, as will also be seen in the petitioners' Motion to Deny, filed this day, the Commission could not lawfully grant Alleghany's pending application for control of the New York Central Railroad Company.

Wherefore your petitioners ask the Commission to dismiss the application of the Alleghany Corporation to control the New York Central Railroad Company and/or any of its constituent companies for want of jurisdiction. Oral argument is requested.

[fol. 450] MOTION TO DENY THE APPLICATION ETC.—Motion of Lewis D. and John Gilbert to Deny the Application of the Alleghany Corporation for the Control of the Properties and Franchises of the Louisville and Jeffersonville Bridge & Railroad Company or the New York Central Railroad Company and/or any of its constituent companies.

Come now Lewis D. and John Gilbert, stockholders in both the Alleghany Corporation and the New York Central Railroad Company, by their attorney and respectfully move the Commission to deny the application of Alleghany Corporation in this proceeding for control of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company or of the New York Central Railroad Company and/or any of its constituent companies on the ground that the Alleghany Corporation is now and has been since January, 1954 continuously in violation of Section 5 (4) of the Interstate Commerce Act.

Your petitioners further move that, in the event the Commission grants the application of Alleghany Corporation, it condition its grant of the application, pursuant to its powers under Section 5 (2)(b), upon the amendment of the charters or by laws of the Alleghany Corporation and the New York Central Railroad Company to provide

for cumulative voting by stockholders in the election of directors for those companies.

Your petitioners submit the following statement in support of this motion.

Statement

Alleghany's application must be dismissed because Alleghany is and has been exercising control over the New York Central Railroad Company and its constituent companies in violation of Section 5 (4) of the Interstate Commerce Act.

If the Commission finds that it has jurisdiction over the application of Alleghany in the present proceeding, it can only be because Alleghany is a carrier and is in this proceeding asking permission to control another carrier, or because Alleghany is here asking for permission to control two or more carriers in asking for control of the New York Central and its constitutent companies. It must find consequently that Alleghany is in fact now in violation of Section 5 (4) of the Interstate Commerce Act. Alleghany has not only acquired a large and controlling stock interest in the New York Central Railroad Company, but it has exercised that control by electing an Alleghany slate of directors to take over the management of the New York Central system. Those directors have now removed officers from the New York Central company and its underlying companies, and elected officers in their place. The senior officer of Alleghany, Mr. R. R. Young, has, for example, been installed as the senior and dominant officer of the New York Central. The exercise of such control by Alleghany without approval from the Commission is clearly contrary to the language and spirit of Section 5 of the Interstate Commerce Act.

[fol. 451] It is very doubtful that the Commission as a matter of law has the power to approve an application for control under Section 5 when that control has been unlawfully taken and used by the applicant, as in the present case. To approve an application under such circumstances would in effect be to grant a pardon to the applicant for violation of an act of Congress; and such a pardoning power does not appear to have been conferred upon the

Commission by any law. Certainly to pardon or condone such illegal acts would be to encourage disragard and violation of the laws of the United States and would be contrary to any normal view of public policy.

The Court of Appeals for the Second Circuit in a decision within the past few months dealt with Alleghany in a similar, if less flagrant, situation. That court in Alleghany v. The James Foundation, 214 F 2 446, was concerned with an appeal from a judgment dismissing Alleghany's complaint for breach of a contract to purchase from the James Foundation shares of the Western Pacific Railroad Company which were conceded to carry with them control of that carrier. It was agreed that at the time Alleghany entered into the contract for purchase of the shares, and at the time at which performance would have had to be made, it controlled the Chesapeake & Ohio Railway Company and was subject to the Commission's order of June 5, 1945. In holding the contract unenforceable the court said:

> "For although Alleghany and the James Foundation could validly contract for the purchase and sale of this controlling interest without *previous* (emphasis supplied) Interstate Commerce Commission approval, nevertheless, absent such approval, the performance of that contract—the 'accomplishment' or the 'effectuating' of the acquisition of the stock—would have been illegal and under 49 U. S. CA. ##5 (4), 5 (7) and 10 (1) would have made each of the parties guilty of a crime. No court could or should encourage violation of the clear statutory policy by enforcing performance of such a contract . . ." 214 F2 446, 450

Here the Commission—if it takes jurisdiction of the application—as to Alleghany—is concerned with an applicant who has taken control of the New York Central in a manner which is "illegal" and has rendered the applicant "guilty of a crime"—to borrow the language of the Court of Appeals. Alleghany has taken control of the New York Central absent previous approval—to paraphrase the language of the Court—and if approval for that control is

needed, the Commission would appear to be bound by the same considerations of public policy and morality as bound the Court of Appeals for the Second Circuit. For that reason alone the Commission can not find a transaction of the kind now presented to it for approval "consistent with the public interest" as required by law. Indeed approval of Alleghany's application for control would nullify Section 5 and would amount to irresponsible and arbitrary administration of the Interstate Commerce Act.

Furthermore the truth of the allegation that Alleghany does not continue to control the Chesapeake & Ohio Railway Company has yet to be proved; and the facts as to that control of want of control should be carefully investigated and established before final action is taken by the Commission with respect to this application insofar as it relates to Alleghany.

Your petitioners call to the attention of the Commission the fact that a majority of the present directors of the Chesapeake & Ohio were chosen by Alleghany Corporation during the period it dominated the affairs of that carrier company; that admittedly the controlling shares of the Chesapeake & Ohio Railway Company when sold in January of 1954 were sold by private treaty, so to speak, to [fol. 452] Mr. Cyrus Eaton without being offered to other possible parties interested in acquiring control of the Chesapeake & Ohio; that they were offered at a price far below what would probably have been paid for the control of the Chesapeake & Ohio if offered on an open, competitive basis; and that Mr. Eaton thereafter played a principal part in making it possible for Alleghany to achieve control of the New York Central Railroad Company. Mr. Eaton, as the chairman and dominant figure of the Chesapeake & Ohio management after January 19, 1954, a position he owed to the management of Alleghany, made available to Alleghany the 600,000 shares of New York Central stock which were deemed essential for control of the New York Central, and thereafter played a major role in arranging the financing of the payment for those shares by nominees of the Alleghany group.

The way in which these intricate transactions were carried out by the various parties involved indicates clearly a

concert of interests which must be carefully explored in the light of the Commission's own holdings in Chesapeake & Ohio Railway Co. Purchase, 271 ICC 5; that the Chesapeake & Ohio and the New York Central are competitive carriers and must not be allowed to fall under common control—however disguised. For the Commission to ignore these considerations, and to fail to examine these transactions with all its powers of investigation would be a patent disregard by the Commission of its obligations to the public interest and to that of the stockholders of the New York Central Railroad Company.

Neverthless, if the Commission should see fit to approve Alleghany's application for control of the New York Central Railroad Company and its constituent companies, it should exercise its power under Section 5 (2)(b) of the Interstate Commerce Act and impose as a term and condition for the approval of Alleghany's control the requirement that the provisions regulating the election of directors for both Alleghany and the New York Central be changed to provide for cumulative voting. Such provisions are in the public interest in giving protection to minority stockholders. Cumulative voting is mandatory in many states—including Illinois, Pennsylvania, Michigan, Ohio and California. It is permissive in New York and Maryland, the states in which the New York Central Railroad Company and Alleghany Corporation are incorporated respectively. It is mandatory for all national banks; and it has been imposed by the Securities and Exchange Commission in its reorganizations under the Public Utility Holding Company Act. Considering the even division of the vote at the last election of the directors for the New York Central—exclusive of the shares held by the Alleghany group, cumulative voting appears especially desirable.

Wherefore your petitioners ask the Commission to deny the application of the Alleghany Corporation in the present proceeding, or to grant it only upon the conditions set out above. Oral argument is requested.

Respectfully submitted, Joseph B. Hyman, Attorney for the Petitioners, 211 South Pitt Street, Alexandria, Virginia.

[fol. 453] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 454] EXHIBIT "A" TO AFFIDAVIT OF DAVID W. WALLACE

ALLEGHANY CORPORATION

January 14, 1955.

TO THE STOCKHOLDERS OF ALLEGHANY CORPORATION:

When your present management assumed office in 1937, it inaugurated a policy of debt reduction and in 1946 began a program of reacquisition and retirement of the Corporation's preferred stock through open market purchases, tender invitations and exchange offers. As a result, substantial savings in annual interest requirements and a large reduction of preferred stock dividend arrearages have been realized. In an effort to further reduce these arrearages, which consitute a legal barrier to dividends on the Common Stock, your Board of Directors has recommended the making of another Exchange Offer to holders of the Series A Preferred Stock of the Corporation, pursuant to which Series A stockholders would receive ten shares of a new 6% Convertible Preferred Stock for each share of Series A Preferred Stock surrendered.

The 6% Convertible Preferred Stock will have a higher dividend rate than the Series A Preferred Stock and the absolute right to elect two directors rather than a right contingent on dividend arrearages, as is presently the case with the Series A Preferred Stock. The 6% Convertible Preferred Stock will be convertible into shares of Common Stock on a basis to be fixed at the date the Exchange Offer closes, as is more fully explained on page 3 of the Proxy Statement. The Series A Preferred Stock does not enjoy any such conversion privilege, and it is the opinion of your Board of Directors that, under prevailing market conditions, such conversion privilege will fully compensate Series A Preferred stockholders who exchange their shares for the 6% Convertible Preferred Stock for their dividend-arrearage claim which they will relinquish upon

such exchange. However, as pointed out on page 3 of the Proxy Statement, should the market price of the Common Stock on the termination date of the proposed Exchange Offer be less than approximately $6 per share, the conversion privilege measured by the market value of the shares of Common Stock into which each share of 6% Preferred Stock is convertible will not as of that date fully compensate the holders of Series A Preferred Stock who exchange their shares. While such conversion privilege will ultimately result in an increased number of shares of Common Stock outstanding, it should be noted that a cash payment to the Corporation of $3.75 will be made for each share of Common Stock issued on conversion. Such cash payments would then be available for investment or other corporate purposes. However, particular notice should be taken that shares of the new 6% Preferred Stock will not be redeemable by the Corporation prior to May 1, 1970. The exchange rate of ten shares of 6% Convertible Preferred Stock for each share of Series A Preferred Stock surrendered is in the nature of a splitup and is expected to result in a market price range which it is believed will be more attractive to individual investors. The proposed exchange is, therefore, expected to benefit both the exchanging stockholders and the Corporation by increasing the interest of the public generally in the 6% Convertible Preferred Stock and by creating a broader market for it.

To make this offering possible, the stockholders of all three classes will have to consider and approve amendments of the Certificate of Incorporation so as to:

1. Create a new class of stock to be known as "6% Convertible Preferred Stock", and
2. Increase the presently authorized shares of Common Stock so as to provide sufficient shares for conversions of the new 6% Convertible Preferred Stock.

If the stockholders approve such amendments and the aforementioned Exchange Offer is made, then to the extent that shares of Series A Preferred Stock are exchanged, dividend arrearages will be reduced. If all of the shares of Series A Preferred Stock are surrendered, then the dividend arrearages now on the books of the Corporation will be completely removed, since there are no dividend ar-

rearages with respect to the $4 Prior Preferred Stock. In addition to the proposals set forth above, there are outlined in the accompanying Proxy Statement three additional changes in the provisions of the Certificate of Incorporation which stockholders will be asked to pass upon at this time.

All of the above changes have had the careful consideration of your Board of Directors, and it is their judgment that the proposals set forth in the accompanying Proxy Statement should be authorized and approved by the stockholders as being in their and the Corporation's best interests. The affirmative vote of two-thirds of the outstanding shares of $4 Prior Preferred Convertible Stock and a majority of the outstanding shares of Series A Preferred Stock and Common Stock is necessary for the adoption of the proposed changes. The Board of Directors urges you to attend the meeting; however, since each class of stock is widely held and therefore holdings are, for the most part, small, all stockholders whether or not they plan to attend the meeting are earnestly requested to sign and return promptly the enclosed form of proxy in the accompanying self-addressed, postage prepaid envelope. Such action on the part of all stockholders regardless of the size of their holdings will eliminate unnecessary delay or expense.

If any information be required in addition to that contained in the Proxy Statement, the officers of the Corporation will be pleased to furnish such information on request.

Very truly yours, David W. Wallace, Secretary and Treasurer.

[fol. 455] ALLEGHENY CORPORATION

Notice of Special Meeting of Stockholders.

Baltimore, Maryland, January 14, 1955.

Notice is hereby given that a Special Meeting of the Stockholders of Allegheny Corporation will be held, as provided in the By-Laws of this Corporation, at the office of the Corporation, Room 1155 Mathieson Building, No. 10 Light Street, Baltimore, Maryland, on Tuesday, the

8th day of February, 1955, at one o'clock P.M., Eastern Standard Time, for the following purposes:

(1) To take action with respect to proposed amendments of Article Sixth of the Corporation's Certificate of Incorporation, as amended, so as:

(a) to create a new class of Preferred Stock, to be known as 6% Convertible Preferred Stock, $10 par value per share, consisting of 1,367,440 shares, to be convertible into shares of Common Stock of the Corporation and to be junior to the class of $4 Prior Preferred Stock of the Corporation and senior to the existing class of Preferred Stock (of which Series A Preferred Stock is a series) and the Common Stock of the Corporation;

(b) to increase the authorized shares of Common Stock of the Corporation, par value $1.00 per share, from 12,350,000 shares to 22,000,000 shares;

(c) to provide that sub-paragraph (h) shall contain a power permitting the Board of Directors to classify or reclassify any unissued shares of stock by fixing or altering in any one or more respects from time to time, before the issuance of such shares, conversion rights of such shares;

(d) to cancel all of the previously authorized 28,367 shares of Prior Preferred Convertible Stock, without par value, no shares of which are presently outstanding, and to delete all reference thereto by deleting sub-paragraphs (k) through (p); and

(e) to reletter sub-paragraphs (q) through (v) respectively, relating to the $4 Prior Preferred Stock, as sub-paragraphs (k) through (p) respectively.

(2) To transact such other business as may properly come before the meeting, or any adjournment or adjournments thereof;

all as set forth in the attached Proxy Statement.

The $4 Prior Preferred Convertible Stockholders, the Cumulative 5½% Preferred Series A Stockholders and the Common Stockholders will be entitled to vote, as sepa-

rate classes, on each of the matters set forth above, all as set forth in the Proxy Statement.

The stock transfer books will not be closed. The Board of Directors, pursuant to the By-Laws, has fixed January 14, 1955 as the date for taking a record of the stockholders and all stockholders of record as of the close of business on said date are entitled to notice of and to vote at said Special Meeting upon the matters above set forth.

You are cordially invited to be present at the meeting. Whether or not you plan to attend the meeting, the Corporation requests that you sign and date the enclosed proxy, and return it promptly in the accompanying business reply envelope which requires no postage if mailed in the United States.

By order of the Board of Directors.

David W. Wallace, Secretary.

[fol. 456] PROXY STATEMENT

ALLEGHANY CORPORATION

Special Meeting of Stockholders, February 8, 1955

This statement is furnished in connection with the solicitation of proxies from holders of the outstanding three classes of stock of Alleghany Corporation, a Maryland corporation (herein sometimes referred to as the "Corporation"), to be voted at the Special Meeting of Stockholders of the Corporation to be held Tuesday, February 8, 1955 (and at any and all adjournments thereof) for the purposes referred to below and set forth in the accompanying Notice of such Special Meeting. Stockholders of record as of the close of business on January 14, 1955 will be entitled to vote. The transfer books will not be closed.

Description of Matters to be Acted Upon

It is intended that, unless otherwise specified, the proxies in the enclosed form received from the holders of Common Stock, Cumulative 5½% Preferred Stock Series A (herein

referred to as "Series A Preferred Stock"), and $4 Prior Preferred Convertible Stock (herein referred to as "$4 Prior Preferred Stock") will be voted in favor of the proposed amendments to Article SIXTH of the Certificate of Incorporation set forth below.

The Board of Directors of the Corporation at a Special Meeting held December 28, 1954 adopted resolutions declaring it advisable to amend Article SIXTH of the Corporation's Certificate of Incorporation, as amended, so as:

Proposal I

(1) to create a new class of Preferred Stock, to be known as 6% Convertible Preferred Stock, $10 par value per share (herein referred to as "6% Preferred Stock"), consisting of 1,367,440 shares, to be convertible into shares of Common Stock of the Corporation and to be junior to the class of $4 Prior Preferred Stock of the Corporation and senior to the existing class of Preferred Stock (of which Series A Preferred Stock is a series) and the Common Stock of the Corporation;

(2) to increase the authorized shares of Common Stock of the Corporation, par value $1.00 per share, from 12,350,000 shares to 22,000,000 shares;

Proposal II

(3) to provide that sub-paragraph (h) shall contain a power permitting the Board of Directors to classify or reclassify any unissued shares of stock by fixing or altering in any one or more respects from time to time, before the issuance of such shares, conversion rights of such shares;

Proposal III

(4) to cancel all of the previously authorized 28,367 shares of Prior Preferred Convertible Stock, without par value, no shares of which are presently outstanding, and to delete all reference thereto by deleting sub-paragraphs (k) through (p); and

(5) to reletter sub-paragraphs (q) through (v) respectively, relating to the $4 Prior Preferred Stock, as sub-paragraphs (k) through (p) respectively.

The Board of Directors directed that such proposed amendments be submitted to the stockholders for action thereon at the Special Meeting of Stockholders to be held on February 8, 1955.

As indicated above, it is intended that the proposed amendments be voted upon by the stockholders as three proposals. Accordingly, as required by the Certificate of Incorporation of the Corporation, as amended, and the laws of the State of Maryland, each of the three proposals must be approved by the affirmative vote of the holders of two-thirds of the outstanding shares of the $4 Prior Preferred Stock and by the holders of a majority of the outstanding shares of the Series A Preferred Stock and the Common Stock, voting as separate classes. If the proposed amendments are adopted by the stockholders, appropriate Articles of [fol. 457] Amendment of the Certificate of Incorporation, as amended, will be filed as soon as practicable after the Special Meeting.

The Corporation has been advised by its counsel that in their opinion stockholders who object to the proposed amendments to the Certificate of Incorporation will not have any right of appraisal.

Specifically, it is proposed that Article SIXTH of the Corporation's Certificate of Incorporation, as amended, be further amended to read in part as set forth in Exhibit A annexed hereto.

Concerning Proposal I

If Proposal I is adopted by the stockholders, it is the present intention of the Board of Directors to offer shares of the new 6% Preferred Stock, referred to in Item (1) above, to the holders of the present Series A Preferred Stock in exchange for the 136,744 shares of the Series A Preferred Stock presently outstanding on the basis of ten shares of the 6% Preferred Stock for each share of Series A Preferred Stock. The Corporation will not obligate itself to complete the exchange unless 100,000 shares of Series A Preferred Stock are surrendered. However, the Corporation will reserve the right to consummate the Exchange Offer upon acceptance by holders of less than 100,000 shares of Series A Preferred Stock. Such Exchange Offer, if made, will be

made subject to the approval of the Interstate Commerce Commission, as set forth below.

Because of the uncertainty as to the number of shares of Series A Preferred Stock which may be surrendered for exchange, the Board of Directors is not prepared presently to decide whether it will call for redemption the shares of outstanding Series A Preferred Stock which shall not have been exchanged under the proposed Exchange Offer, or to what extent, except as hereafter stated, it will pay dividends on account of arrearages on the shares of Series A Preferred Stock then outstanding. Nevertheless, if the approval of the Interstate Commerce Commission is obtained and the proposed Exchange Offer is consummated, the Board of Directors of the Corporation presently intends thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of Series A Preferred Stock at the rate of $5.50 per share per annum.

As specified in the Corporation's Certificate of Incorporation, as amended, the redemption price of the Series A Preferred Stock is $105 per share plus the amount of all dividends accumulated and unpaid thereon at the redemption date, whether or not earned or declared. If the redemption date were May 1, 1955, the redemption price per share would be $237. Dividend arrearages on the Series A Preferred Stock on May 1, 1955 would be $132 per share.

The Corporation has been advised by its counsel that in their opinion stockholders who exchange their shares of Series A Preferred Stock for shares of 6% Preferred Stock will not thereby incur any gain or loss for Federal income tax purposes; and that stockholders who retain their shares of Series A Preferred Stock will realize ordinary income for Federal income tax purposes on any dividends received, whether such dividends are current dividends or on account of cumulative dividend arrearages, except that they will realize capital gain or loss with respect to any amounts received on the redemption of such stock if such stock is ultimately redeemed.

The proposed plan for the issuance of 6% Preferred Stock in exchange for shares of Series A Preferred Stock, as well as the issuance and sale of Common Stock by the Corpora-

tion upon conversion of the 6% Preferred Stock, requires the approval of the Interstate Commerce Commission. It is intended that if the stockholders of the Corporation adopt the proposed amendments to the Certificate of Incorporation, an application for such approval of the Interstate Commerce Commission will be made as soon as practicable following such action of the stockholders.

The proposed amendment referred to in Item (2) above is deemed advisable by the management of the Corporation in order to provide a sufficient number of shares of Common Stock into which the 6% Preferred Stock will be convertible and, should there be an excess amount not required for such conversions, to provide additional shares of Common Stock which will be available for future financing. There are presently outstanding or reserved for issuance upon exercise of existing conversion and purchase rights 7,176,727 shares of the 12,350,000 authorized shares of the Corpora- [fol. 458] tion's Common Stock and 5,173,273 shares are authorized, unissued and available for issuance for such purposes and for such considerations as are deemed appropriate by the Board of Directors. Application of the proposed conversion formula is not susceptible of an exact determination at this time of the number of additional shares of Common Stock which will be required for such conversions. Such proposed formula provides that the holder of each share of the 6% Preferred Stock, at any time prior to five days before its redemption, will, upon payment to the Corporation of $3.75 per share of Common Stock into which such share is convertible, be entitled to convert such share of 6% Preferred Stock into such number of fully paid and non-assessable shares of Common Stock of the Corporation as shall be fixed by the Board in connection with the Exchange Offer. The Board will fix such number of shares by dividing (1) 23.7 (being 1/10 of the May 1, 1955 redemption price of Series A Preferred Stock) by (2) the difference between $3.75 and an amount equal to the closing price of the Corporation's Common Stock on the New York Stock Exchange on the termination date of the Exchange Offer (or if no sale took place on such date then an amount equal to the closing price on the last preceding day on which a sale was made). The result of such computation shall be

computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6% Preferred Stock be convertible into more than 10.8 shares of Common Stock of the Corporation. At the time of original issuance of the 6% Preferred Stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of Common Stock into which each share of 6% Preferred Stock is convertible upon payment of $3.75 per share of Common Stock. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any share or shares of 6% Preferred Stock. If the aggregate number of shares of 6% Preferred Stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of Common Stock, the number of shares of Common Stock issuable upon such conversion shall, subject to the 10.8 share maximum limitation stated above, equal such whole number, and an amount equal to (1) such fraction multiplied by (2) the excess of the closing price on the New York Stock Exchange of the Corporation's Common Stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 shall be paid in cash by the Corporation to such holder. In the event of any reclassification, exchange or other change of the Common Stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of Common Stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of 6% Preferred Stock will be adjusted accordingly. Assuming that the closing price of the Common Stock on the termination date of the Exchange Offer was $8.375 (the actual closing price on December 21, 1954) the number of shares of Common Stock into which one share of said 6% Preferred Stock would be convertible would be 5.1 shares and the aggregate conversion payment in connection therewith, at the rate of $3.75 per share, would be $18.75. Assuming that the holder of one share of 6% Preferred Stock exercised his conversion privilege, the Corpo-

ration would have paid him $0.46 in lieu of issuing scrip for his remaining fractional interest. Based upon the same price assumption, the aggregate market value of the five full shares of Common Stock obtained upon conversion, using the same value per share, would have been $41.88 which, less the net aggregate conversion payment of $18.29 ($18.75 less $0.46) would have represented an approximate market value of $23.59. Should the market price of the Common Stock on the termination date of the proposed Exchange Offer be less than approximately $6 per share, the conversion privilege measured by the market value of the shares of Common Stock into which each share of 6% Preferred Stock is convertible will not as of that date, because of the 10.8 share maximum limitation stated above, fully compensate the holders of Series A Preferred Stock who exchange their shares. Such approximate market values do not reflect any possible adverse effect on the market prices because of dilution of the asset value of shares of Common Stock as a result of conversions of 6% Preferred Stock, as to which the table on page 7 hereof should be consulted.

Extending the assumptions made above with respect to one share of said 6% Preferred Stock to 1,367,440 shares of 6% Preferred Stock, which number of shares would be outstanding if the holders of all outstanding shares of Series A Preferred Stock accepted the Exchange Offer, and making such computations as of November 30, 1954, approximately 14,358,120 additional shares of Common Stock would be [fol. 459] required in connection with such conversions, and 465,153 shares would remain authorized, unissued and available for issuance for such purposes and for such considerations as are deemed appropriate by the Board of Directors. As of December 21, 1954, however, 6,973,944 additional shares would be required in connection with such conversions and 7,849,329 shares would remain authorized and unissued. Such unissued shares as are not required for conversion purposes will be subject to the preemptive rights of Common Stockholders as detailed in and limited by the provisions of Article Ninth of the Corporation's Certificate of Incorporation, as amended, as set forth in Exhibit B hereto. The management of the Corporation has no present intention of issuing any such shares not required for conver-

sion purposes, but believes it to be in the best interests of the Corporation to have these additional shares available for future issuance if the occasion should require.

The Corporation will make application, as soon after authorization by stockholders as is practicable, for the listing on the New York Stock Exchange of the 6% Preferred Stock and for the shares of Common Stock into which such 6% Preferred Stock may be converted, each upon official notice of issuance thereof.

Concerning Proposal II

At the present time the Board of Directors of the Corporation has the power, pursuant to sub-paragraph (h) of Article SIXTH of the Certificate of Incorporation, but subject to the provisions of sub-paragraph (f) thereof, to classify or reclassify any unissued shares of stock by fixing or altering in any one or more specified respects, before the issuance thereof, the preferences, voting powers, restrictions and qualifications of, the fixed annual dividends on, and the times and places of redemption, and redemption price, of such stock, but it does not now have the power to issue such stock as convertible stock. Therefore, the proposed amendment set forth in Item (3) above is deemed advisable to permit the Board of Directors to fix, in addition, conversion rights of unissued shares of stock as is permitted by Maryland law.

Concerning Proposal III

The proposed amendment referred to in Item (4) above is deemed advisable by the management of the Corporation to simplify the Corporation's Certificate of Incorporation, as amended, inasmuch as none of such shares of Prior Preferred Stock is presently outstanding. The 25,845 presently outstanding shares of $4 Prior Preferred Stock were issued during 1953 in exchange for 25,845 shares of the previously outstanding Prior Preferred Stock, and the remaining outstanding shares of such stock were called for redemption by the Corporation during 1953. However, there are outstanding a small number of interest coupons which were appurtenant to the Corporation's Twenty-Year Collateral Trust Convertible 5% Bonds, due April 1, 1950 (all of which Bonds

not previously retired were called for redemption in 1944), the holders of which coupons are entitled to receive in exchange an aggregate of 41 shares of Prior Preferred Stock. Also, 410 shares of Common Stock are now reserved for issuance upon conversion of such 41 shares of Prior Preferred Stock, at the rate of ten shares of Common Stock for each such share of Prior Preferred Stock. A preponderance of said interest coupons were surrendered in 1934 in exchange for shares of Prior Preferred Stock and by March 16, 1953, 99.012% of them had been surrendered. The Corporation assumes that the remaining coupons have been lost. If any such interest coupons should now be surrendered in exchange for shares of Prior Preferred Stock, the Corporation would forthwith call such shares for redemption. Accordingly, following the effectiveness of such proposed amendment, if any of said interest coupons should be surrendered to the Corporation, the holders thereof will be offered a choice of receiving either the redemption value (approximately $50) or 10 shares of Common Stock (the conversion right) per share of Prior Preferred Stock issuable in exchange for the coupons so surrendered.

The proposed amendment referred to in Item (5) above is a technical change, made advisable by the proposed deletion from the Certificate of Incorporation of the present sub-paragraphs (k) through (p) relating to the Prior Preferred Stock, simply to reletter, without change of meaning, the present sub-paragraphs (q) through (v) of the Certificate of Incorporation relating to the $4 Prior Preferred Stock.

Proposed Exchange Offer of 6% Preferred Stock for Series A Preferred Stock and Effects Thereof

In the opinion of the management of the Corporation, the proposed amendments and resulting recapitalization, including the Exchange Offer of ten shares of 6% Preferred [fol. 460] Stock for each share of Series A Preferred Stock, are in the best interests of the Corporation and of the holders of all three of its present classes of stock. No dividends were paid by the Corporation on any class of its stock from May 1, 1931 through the year 1949, nor were any dividends paid on any class of its stock in 1953. Dividends were paid by the Corporation on the Prior Preferred Convertible

Stock in the years 1950, 1951 and 1952 in the respective amounts of $2.50, $5 and $10 per share. Dividends were paid by the Corporation on the $4 Prior Preferred Stock in 1954 in the amount of $4 per share. The aggregate cash dividends declared and paid by the Corporation in the years 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470 and $103,380, respectively. Assuming that the proposed transactions are completed on a maximum basis (136,744 shares of Series A Preferred Stock being exchanged), and that during the entire year 1956 there were issued and outstanding 25,845 shares of $4 Prior Preferred Stock and 1,367,440 shares of 6% Preferred Stock, the aggregate dividend requirements for each class of said stock would be $103,380 and $820,464, respectively. The payment of dividends is, of course, dependent upon the earnings and financial condition of the Corporation. As will be noted from the table set forth on page 9 hereof, neither the dividend requirements of the Series A Preferred Stock nor of the 6% Preferred Stock were earned from portfolio income in either 1953 or 1954. Payment of dividends on any of the classes of preferred stock of the Corporation during 1955 and successive years will be dependent upon a material improvement in net portfolio income or the availability of profits from security transactions.

If the proposed recapitalization is completed and all of the shares of Series A Preferred Stock are exchanged, the present dividend arrearages with respect to the Series A Preferred Stock will be removed. Inasmuch as there is no dividend arrearage on the $4 Prior Preferred Stock, and dividends are currently being paid thereon, the new 6% Preferred Stock would be entitled to receive dividends on a current basis and the Corporation would not be prevented solely by a dividend arrearage on senior stock from paying dividends to the holders of its Common Stock. The aggregate amount of dividend accumulations on the Series A Preferred Stock as of November 30, 1954 was $17,736,836.34, or $129.71 per share.

The proposed Exchange Offer and recapitalization will result in no substantial change in the applicable net assets of the Corporation available with respect to each share of $4 Prior Preferred Stock, but will result in substantial changes

in the rights of the holders of the Series A Preferred Stock who exchange their stock. Such changes are discussed elsewhere herein, principally under the heading "Material Differences Between and Comparison of Series A Preferred Stock and 6% Preferred Stock".

By virtue of the conversion rights of the 6% Preferred Stock, it is expected that the persons exchanging Series A Preferred Stock will be afforded an opportunity to participate in the progress of the Corporation, as reflected in the market value of its Common Stock. The existence of such conversion rights will not have any immediate effect on the $4 Prior Preferred Stock or Common Stock but the exercise of such conversion rights will at that time have the effect of diluting the rights of Common stockholders and consequently the conversion rights of the $4 Prior Preferred Stock to the extent shown below.

With respect to the rights of the Common stockholders of the Corporation, if all of the outstanding shares of Series A Preferred Stock are surrendered for exchange pursuant to the proposed Exchange Offer and recapitalization, as stated above, all dividend arrearages on senior classes of stock would be wiped out and the Corporation would be legally entitled to begin the payment of dividends on Common Stock. If less than all of the outstanding shares of Series A Preferred Stock are surrendered for exchange, the Corporation would not be legally entitled to begin the payment of dividends on Common Stock until the remaining shares of Series A Preferred Stock were redeemed or full payment made of the cumulative dividend arrearages thereon.

To the extent that shares of Series A Preferred Stock might ultimately be redeemed rather than exchanged, or dividend arrearages thereon might ultimately be paid in cash, the assets of the Corporation would be reduced by the amount of cash expended, and, as a consequence, the income of the Corporation might reasonably be expected to be reduced accordingly. It should be noted that the aggregate accrued dividends on all presently outstanding shares of Series A Preferred Stock on May 1, 1955, would be $18,050,208 and if it were assumed that payment of such accrued dividends was to be made on that date, such payment would require the liquidation of a substantial part of

the Corporation's portfolio of investments with a resulting loss in earning power.

[fol. 461] The effect on the present Common Stock of the conversion rights of the 6% Preferred Stock is substantial and should be noted. Assuming that the proposed exchange is completed and that the 136,744 present outstanding shares of Series A Preferred Stock are exchanged and ultimately converted into shares of Common Stock, there would be required to be issued, applying the proposed conversion formula mentioned above as of November 30, 1954, 14,358,120 shares of Common Stock, and applying it as of December 21, 1954, 6,973,944 shares of Common Stock. As of both November 30, 1954 and December 21, 1954, there were outstanding 4,637,797 shares of Common Stock. It will be noted, therefore, that the shares of Common Stock ultimately issuable to the present holders of the Series A Preferred Stock will represent, on the foregoing November 30 assumptions, approximately 75.6%, and on the foregoing December 21 assumptions, approximately 60.1%, of all shares of Common Stock outstanding upon giving effect to such conversions. However, it should also be noted that in connection with the exercise of such conversion rights of the 6% Preferred Stock, and on the basis of the foregoing November 30 assumptions, the Corporation will receive an aggregate of $53,842,950 and on the foregoing December 21 assumptions $26,152,290, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion), which cash will be available for working capital and investment. For the possible diluting effect of the issuance of such shares of Common Stock under the proposed conversion formula, the information set forth in the table on page 7 hereof should be consulted.

Attached hereto are financial statements of the Corporation, which include a Balance Sheet of the Corporation as of November 30, 1954, in which investments are carried at indicated market quotations as of that date (except for certain unlisted securities and joint venture investments which are carried at cost). Set forth in the table below, under the heading "Actual" are the amounts (with respect to Table I based on such Balance Sheet and with respect to Table II based on computations prepared by the Corporation in sim-

ilar manner as of December 21, 1954) of the net assets (total and per share) applicable to $4 Prior Preferred Stock, 6% Preferred Stock, Series A Preferred Stock and Common Stock (after deducting in each case the aggregate involuntary liquidation value, including any accumulated and unpaid dividends, of all classes of stock senior to the class in question). Also set forth in the tables below under the heading "Extent of Exchanges Assumed" are the approximate amounts of similar net assets on a pro forma basis, derived by applying to such figures the effect of exchanges assumed to the extent indicated. In making these computations, it has been assumed that each aggregate $100 par value of 6% Preferred Stock (par value $10 per share) was issued (ten shares for one share) in exchange for $100 par value of Series A Preferred Stock.

TABLE I

	Actual		Extent of Exchanges Assumed			
			Assuming Exchange of 136,744 shares		Assuming Exchange of 100,000 shares	
	Total	Per Share	Total	Per Share	Total	Per Share
Applicable Net Assets:						
$4 Prior Preferred	$59,025,005	$2,283.81	$59,025,005	$2,283.81	$59,025,005	$2,283.81
6% Preferred	———	———	56,940,175	41.64	56,940,175	56.94
Series A Preferred	56,940,175	416.40	———	———	46,940,175	1,277.49
Common	25,528,939	5.50	43,265,775	9.33	38,499,772	8.30

TABLE II

Applicable Net Assets:						
$4 Prior Preferred	$66,431,599	$2,570.38	$66,431,599	$2,570.38	$66,431,599	$2,570.38
6% Preferred	———	———	64,340,738	47.05	64,340,738	64.34
Series A Preferred	64,340,738	470.52	———	———	54,340,738	1,478.90
Common	32,885,630	7.09	50,666,338	10.92	45,888,546	9.89

Based upon the assumptions there stated, the foregoing tabulation indicates a range of possible effects of carrying out the proposed exchange of 6% Preferred Stock for Series A Preferred Stock.

[fol. 462] Effect of Various Assumed Rates of Conversion of 6% Preferred Stock Into Common Stock

Set forth in the table below are the net asset values per share of the Corporation's Common Stock after giving effect to the assumed rates of conversion, and conversions, indicated.

Assumed Net Asset Value of Common	Net Asset Value per Share of Common Stock after Assumed Conversions at Indicated Rates			
	Converting at 10.5 for 1 (1)		Converting at 5.1 for 1 (2)	
	1,000,000 shs. of 6% Pfd.	1,367,440 shs. of 6% Pfd.	1,000,000 shs. of 6% Pfd.	1,367,440 shs. of 6% Pfd.
$ 3	$4.18	$4.29	$4.42	$4.63
4	4.49	4.53	4.90	5.03
5	4.79	4.78	5.37	5.43
6	5.10	5.02	5.85	5.83
7	5.41	5.26	6.32	6.23
8	5.71	5.51	6.80	6.63
9	6.02	5.75	7.28	7.02
10	6.33	6.00	7.75	7.42

(1) Conversion rate based on Nov. 30, 1954 market values.
(2) Conversion rate based on Dec. 21, 1954 market values.

Information With Respect to Series A Preferred Stock

The par value and the redemption and liquidation values of the Series A Preferred Stock as of November 30, 1954 were as follows:

Series A Preferred Stock

Par Value	$100
Redemption Value	234-17/24 (a)
Voluntary Liquidation Value	234-17/24 (a)
Involuntary Liquidation Value	229-17/24 (a)

(a) Includes unpaid dividends of $129-17/24 per share.

The number of holders and the number of shares of Series A Preferred Stock authorized, issued and outstanding in the hands of the public and held in the Treasury as of November 30, 1954, were as follows:

Series A Preferred Stock

Number of Holders	1,283
Number of Shares Authorized	1,195,000
Number of Shares Issued	144,544
Number of Shares Outstanding in Hands of Public	136,744
Number of Shares Held in the Treasury	7,800

Material Differences Between and Comparison of Series A Preferred Stock and 6% Preferred Stock

The rights of holders of the 6% Preferred Stock and the Series A Preferred Stock will be similar in many respects, but there will be substantial points of distinction as mentioned hereafter. The following statements do not purport to be a complete statement of all rights of the holders of 6% Preferred Stock or of Series A Preferred Stock, nor do such statements necessarily give full effect to provisions of statu- [fol. 463] tory or common law. These statements are subject in all respects to the provisions of the Certificate of Incorporation, as amended, and to the proposed amendment of the Certificate of Incorporation as reflected in Exhibit A annexed hereto, and the following statements are qualified in their entirety by the foregoing.

The 6% Preferred Stock will be senior to the Series A Preferred Stock, and to the shares of authorized but unissued Preferred Stock of which class the Series A Preferred Stock is a series. The 6% Preferred Stock will be of the par value of $10 per share, whereas the Series A Preferred Stock is of the par value of $100 per share. Accordingly, for the purposes of this comparison, it must be remembered that the proposed Exchange Offer contemplates the offering of 10 shares of the new 6% Preferred Stock in exchange for each share of the present Series A Preferred Stock.

The Series A Preferred Stock is entitled to cumulative dividends at the rate of 5½% per annum on the par value thereof ($100) in preference to Common Stock, whereas the 6% Preferred Stock will be entitled to cumulative dividends at the rate of 6% per annum on the par value thereof ($10) in preference to both the Common Stock and the Series A Preferred Stock. Dividends on the 6% Preferred Stock will not commence to accrue until May 1, 1955 and shall be cumulative from such date. The first of such accrued dividends will be payable October 1, 1955. The redemption value used in the proposed conversion formula takes into account the fact that dividends on the 6% Preferred Stock will not commence to accrue until a date subsequent to issuance and is designed to compensate therefor.

Regarding 10 shares of the 6% Preferred Stock as the

equivalent of 1 share of the Series A Preferred Stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that yment will be made to the holders of the 6%. Preferred tock before any payment is made to the holders of the Series A Preferred Stock. However, because the dividend arrearages on the present Series A Preferred Stock are so substantial, the relative redemption values of each class are substantially different. The cash redemption value of one share of Series A Preferred Stock on May 1, 1955 will be $237, whereas the cash redemption value of 10 shares of 6% Preferred Stock on that date would aggregate $105, the difference representing the accumulated and unpaid dividends aggregating $132 as of that date with repsect to the Series A Preferred Stock. The main purpose of the proposed recapitalization is to eliminate such dividend arrearages on the Series A Preferred Stock.

There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the Corporation will by the express terms of its Certificate of Incorporation be precluded from redeeming any shares of the 6% Preferred Stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of the Series A Preferred Stock. Neither class of stock is entitled to preemptive rights.

The Series A Preferred Stock is entitled to the benefits of a sinking fund, the provisions with respect to which are not operative at the present time because of accumulated dividends in arrears on the Series A Preferred Stock. There is no provision for a sinking fund with respect to the 6% Preferred Stock.

In case of default in the payment of four quarterly instalments of dividends on Series A Preferred Stock, or the elapsing of twenty-four consecutive months during which the Corporation shall at no time have fully paid up all dividends due on such stock, such stock is entitled to elect two directors of the Corporation. Series A Preferred Stock is at the present time so entitled to elect directors. Accordingly, the

holders of the Series A Preferred Stock, including Messrs. Young, Kirby and Van Pelt (whose holdings of Series A Preferred Stock are listed on page 13 hereof), to the extent that they do not exchange all of their shares of Series A Preferred Stock, will retain this contingent right to elect two directors until such shares are redeemed or retired. The holders of the 6% Preferred Stock, voting as a class, will have a right to elect two directors regardless of whether or not dividends are currently paid.

The Series A Preferred Stock is not convertible. The 6% Preferred Stock will be convertible into Common Stock at a rate to be fixed by the Board of Directors prior to issuance in accordance with the proposed conversion formula.

The affirmative approval of the holders of a majority of the outstanding shares of Series A Preferred Stock is required before the Corporation may issue any additional shares of such stock or of any other class of stock on a parity with or having priority over such stock. The issuance of any [fol. 464] shares on a parity with or prior to shares of 6% Preferred Stock or the making of any material change in the Certificate of Incorporation, or the By-Laws of the Corporation, with respect to the 6% Preferred Stock will require the affirmative approval of the holders of two-thirds of the outstanding shares of 6% Preferred Stock.

Certain Information Concerning Alleghany Corporation

There are attached hereto Balance Sheets of the Corporation as of December 31, 1953 and November 30, 1954, and related Statements of Income and Surplus (deficit) for the three years and eleven months ended November 30, 1954, together with the report of Peat, Marwick, Mitchell & Co., independent public accountants for the Corporation, with respect to the financial statements at December 31, 1953 and the three years then ended.

There is also attached hereto a schedule of investments showing both cost and market quotations as of November 30, 1954, including jointly held securities in joint ventures as of November 30, 1954, which has been prepared by the Corporation and is subject to audit by independent accountants.

The following is a summary of earnings of the Corporation for the periods indicated, which summary is for the

years 1934-53 and for the eleven months ended November 30, 1954, inclusive, based on financial statements contained in Annual Reports and in the interim reports attached hereto but adjusted by the Corporation to effect uniformity of accounting to reflect, in the years to which they apply, items recorded in later years:

[fol. 465] Based on the above figures under the heading "Net Income or *Loss* Exclusive of Security Transactions", the net income or *loss* per share of the several classes of stock of the Corporation for the years 1934-53 and for the eleven months ended November 30, 1954 has been as follows:

	Gross Income	Net Income or *Loss* exclusive of security transactions before provision for Federal taxes on Income	Federal taxes on Income	Net Income or *Loss* exclusive of security transactions	Profits or *Losses*	
					From Sales of Investment Securities	From Transactions in Own Bonds
1934	$ 3,364,675	*$(1,108,665)*	—	*$(1,108,665)*	$ 689	—
1935	3,975,063	*(509,392)*	—	*(509,392)*	1,007	—
1936	3,923,323	*(482,388)*	—	*(482,388)*	3,494	—
1937[1]	12,805,912	8,180,012	—	8,180,012	786	—
1938	2,428,129	*(2,136,460)*	$375,000	*(2,511,460)*	*(29,609,281)*	$ 764,171
1939	3,622,492	*(1,102,951)*	—	*(1,102,951)*	*(20,383,751)*	336,801
1940	6,057,134	1,635,837	53,242	1,582,595	5,315	331,815
1941	6,290,828	1,988,231	91,500	1,896,731	6,816	994,658
1942	6,560,643	2,370,577	134,940	2,240,637	*(426,177)*	581,569
1943	6,619,624	3,092,814	188,350	2,904,464	453,119	*(553,004)*
1944	4,745,579	2,048,786	252,651	1,796,135	4,853,226	*(1,677,617)*
1945	2,565,106	1,471,269	95,375	1,375,894	*(2,572,231)*	*(232,725)*
1946	2,570,929	1,703,776	110,000	1,593,776	2,007,597	—
1947	2,628,686	1,856,132	110,000	1,746,132	*(13,747,895)*	—
1948	5,439,055	4,634,609	598,000	4,036,609	*(6,235,210)*	—
1949	2,887,356	1,982,558	113,000	1,869,558	*(5,583,016)*[2]	—
1950	2,189,613	1,334,408	90,000	1,244,408	2,175,997[2]	—
1951	2,117,017	995,378	75,000	920,378	*(605,037)*	—
1952	2,384,525	931,652	70,000	861,652	50,806	—
1953	2,020,715	264,222	20,000	244,222	6,452,830	—
1954 (11 mos.)	[3]1,666,967	169,593	8,000	161,593	1,357,640[4]	—

Parentheses and italics denote red figures.

(1) Includes $8,629,605, representing cost to Chesapeake Corporation of 255,600 shares Chesapeake and Ohio Railway Company common stock received as an extra dividend November 30, 1937 on 1,278,000 shares of common capital stock of The Chesapeake Corporation, a company then controlled by Alleghany Corporation.

(2) Includes $51,272 net loss on exchanges of investment securities for Alleghany Corporation preferred stocks.

(3) Not audited by independent accountants.

(4) Includes loss of $418,320 on sale of 104,854 shares of The Chesapeake and Ohio Railway Company common stock, of which 93,600 shares were acquired, in the 1938–1942 liquidation of The Chesapeake Corporation, on the 1929–1930 cost basis of The Chesapeake Corporation common stock.

Year	Net Income per Share of Stock: Prior Preferred Convertible[1]	Series A Preferred[2]	Common[3]
1934	—	$(1.66)	$(1.15)
1935	$(3.87)	(1.26)	(1.05)
1936	(3.89)	(1.19)	(1.01)
1937	72.37	11.83	0.94
1938	(22.50)	(4.18)	(1.43)
1939	(9.88)	(2.07)	(1.12)
1940	14.17	1.95	(0.52)
1941	16.99	2.42	(0.45)
1942	20.07	2.94	(0.38)
1943	26.02	3.93	(0.23)
1944	16.09	2.27	(0.48)
1945	12.32	1.64	(0.57)
1946	16.08	2.16	(0.45)
1947	23.60	2.83	(0.32)
1948	70.96	8.95	0.33
1949	50.29	5.85	0.02
1950	34.80	4.72	(0.04)
1951	28.53	3.54	(0.10)
1952	30.43	5.38	(0.09)
1953	7.08	1.03	(0.08)
1954 (11 months)	6.25	0.43	(0.14)

Parentheses and italics denote red figures.

(1) The Prior Preferred Convertible Stock was redeemed on October 1, 1953. Consequently the 1953 amount is a 9-month figure and the 1954 figure refers to the $4 Prior Preferred Convertible Stock which was issued in 1953 in exchange for Prior Preferred Convertible Stock.

(2) After deducting the amount of current dividend requirements for Prior Preferred Stock through September 30, 1953 although not paid, and thereafter the amount of dividends on the $4 Prior Preferred Stock which were paid. The annual dividend requirement for each share of Series A Preferred Stock is $5.50.

(3) After deducting the amount of current dividend requirements for Prior Preferred Stock through September 30, 1953 and Series A Preferred Stock although not paid, and thereafter the amount of dividends on the $4 Prior Preferred Stock which were paid.

[fol. 466] The Corporation's Series A Preferred Stock and the Common Stock are listed on the New York Stock Exchange. The high and low sales prices for periods commencing with the year 1934 and the number of shares sold on the New York Stock Exchange during such periods, as reported in The Commercial & Financial Chronicle, were as follows:

	Series A Preferred[1]			Common		
Year	Low	High	Number of Shares Sold	Low	High	Number of Shares Sold
1934	4 3/8	16 1/8	213,600	1 1/4	5 1/4	797,600
1935	2 3/8	14 5/8	162,400	3/4	3 3/8	747,800
1936	12 3/8	61 1/2	616,500	2 1/2	5 1/2	1,963,700
1937	11	59 3/4	238,700	1	5 3/8	1,440,700
1938	6 1/4	17 7/8	353,800	7/8	1 5/8	407,600
1939	5 3/4	20 1/2	410,800	5/8	2	372,700
1940	5 3/4	14 5/8	279,600	3/8	1 1/8	236,200
1941	3 5/8	10 5/8	147,600	1/8	5/8	229,800
1942	3 1/2	6 3/8	148,200	3/16	1/2	149,600
1943	5 1/8	32 1/4	1,148,900	3/16	3 1/4	1,852,600
1944	23 1/2	38	936,900	2	3 1/4	1,235,600
1945	34 5/8	60 3/4	873,700	2 5/8	6 1/8	2,793,600
1946	29 3/4	69 1/4	499,700	3 3/8	8 1/4	2,506,300
1947	25 1/4	44	319,900	2 3/4	5 3/4	1,067,400
1948	37	58 1/2	251,200	2 1/2	4 3/8	1,107,800
1949	40 1/2	82 1/2	169,500	2 1/8	4	981,200
1950	58	86 3/4	91,500	2 5/8	5 1/8	1,780,900
1951	73 1/2	87 3/8	46,900	3	4 7/8	1,452,700
1952	79 3/8	158 1/4	80,500	2 3/4	5 3/8	1,503,100
1953	130	152	20,200	3	5 3/8	1,182,200
1954 (11 months)	140	170	19,700	3 1/4	6 3/8	1,609,500

[1] With respect to periods prior to February 1, 1944, the figures given relate to Series A Preferred Stock with warrants (expiring on February 1, 1944) attached for the purchase of Common Stock at $30 per share.

During the period December 1 to December 31, 1954 the low and high sales prices for said Series A Preferred Stock were 170½ low and 210 high per share, respectively, and for said Common Stock were 5⅞ low and 9 high per share, respectively. 6,300 shares of said Series A Preferred Stock and 989,800 shares of said Common Stock were sold on the New York Stock Exchange during December, 1954.

[fol. 467] As of December 31, 1937 to 1953, inclusive, the total net assets and the net assets per share of Series A Preferred Stock and Common Stock, on the basis of financial statements contained in annual reports but adjusted by the Corporation in the same manner as the summary of earnings of the Corporation hereinabove set forth, have been ad-

justed, and based on indicated market quotations of assets of the Corporation (except certain unlisted securities and joint venture investments which are carried at cost) at such dates, and the similar total net assets and the net assets per share as of November 30, 1954, on the basis of the attached Balance Sheet referred to above and based on market quotations as of such date, have been as follows:

Year	Total Net Assets	Net Assets per Share	
		Series A Preferred	Common
1937	$(*1,522,183*)	$(*11.41*)	—
1938	4,293,759	(*3.09*)	—
1939	16,306,298	14.25	—
1940	19,722,387	18.86	—
1941	5,614,108	(*2.74*)	—
1942	12,686,021	7.26	—
1943	40,685,065	48.76	—
1944	49,960,672	62.21	—
1945	65,763,252	85.46	—
1946	55,719,552	76.74	—
1947	50,753,586	80.92	—
1948	42,412,552	86.24	—
1949	32,929,876	97.69	—
1950	37,941,785	142.25	—
1951	37,655,260	147.37	—
1952	41,511,995	265.42	$1.50
1953	34,657,540	238.14	0.40
1954 (November 30)	59,025,005	416.40	5.50

Italics within parentheses and dashes denote negative asset values.

[fol. 468] Interest of Management

The following statements concerning the beneficial ownership of securities of Alleghany Corporation held by the Directors are based upon information received from the Directors themselves as to their respective holdings as of December 1, 1954:

Nominee	Principal Occupation	Securities of Alleghany Corporation Beneficially Owned				
		Shares of $4 Prior Preferred Convertible Stock	Shares of Preferred Stock Series A	Shares of Common Stock	Shares of Common Stock Purchasable Under Warrants	Principal Amount of 5% Sinking Fund Debentures
O. Henry Briggs	Management of Personal Affairs	200	—	200	—	—
Walter W. Foskett	Attorney; Trustee, Chairman and General Counsel of Estate of Sir Henry Oaks, Bt., deceased, Nassau, Bahamas; General Investments	—	—	28,946	—	—
Henry J. Guild	President and Director of Brightwater Paper Company	—	—	100	—	—
Allan P. Kirby	President of Alleghany Corporation; Director of The New York Central Railroad Company; Management of Personal Affairs	—	12,950	516,500	226,340	$631,700
Herman R. Neff	Engineer, President and Director of the Geo. S. Rider Co., Cleveland, Ohio (Professional Services—preparation of plans and specifications for industrial and institutional buildings)	10	—	2,000	—	—
Andrew Van Pelt	Management of Personal Affairs	—	500	1,000	8,500	40,000
Robert R. Young	Chairman of the Board of Alleghany Corporation; Chairman of the Board of The New York Central Railroad Company	2,500	11,087	30,000	—	—

The outstanding number of shares of each class of voting securities of Alleghany Corporation as of December 1, 1954 was as follows: 25,845 shares of $4 Prior Preferred Convertible Stock; 136,744 shares of Preferred Stock, SeriesA; and 4,637,797 shares of Common Stock.

As of December 1, 1954, Mr. Allan P. Kirby, the President and a director of the Corporation, was the beneficial owner of $631,700 principal amount of 5% Sinking Fund Debentures, Series A, due November 1, 1962, of the Corporation or 8.4% of the Corporation's total outstanding; 12,959 shares, or 9.5% of the Series A Preferred Stock of the Corporation; 516,500 shares, or 11.1%, of the Common Stock of the Corporation. As of December 1, 1954, a personal holding company in which Mr. Kirby has an interest, owned 200 shares of Series A Preferred Stock. Mr. Kirby is President of a charitable corporation, in which he has no financial interest, which owned, on December 1, 1954, 1,162 shares of Series A Preferred Stock, and 6,700 shares of Common Stock of the Corporation.

As of December 1, 1954, Mr. Robert R. Young, Chairman of the Board of the Corporation, was the beneficial owner of 2,500 shares, or 9.7%, of the $4 Prior Preferred Convert- [fol. 469] ible Stock of the Corporation; 11,087 shares, or 8.1%, of the Series A Preferred Stock, of the Corporation; 30,000 shares, or 0.7%, of the Common Stock of the Corporation; and Options to purchase 100,000 shares of the Common Stock of the Corporation at a price of $3.0625 per share. As of December 1, 1954, Anita O'Keefe Young, wife of Mr. Robert R. Young, was the beneficial owner of 12,650 shares, or 48.9%, of $4 Prior Preferred Convertible Stock; 3,738 shares, or 2.7%, of Series A Preferred Stock; and Alleghany Corporation Warrants evidencing the right to purchase an aggregate of 7,100 shares of Common Stock of the Corporation.

Each of the officers and directors of the Corporation has informed the Corporation that his holdings will be voted in favor of the proposed amendments to the Certificate of Incorporation of the Corporation. In addition, Mr. and Mrs. Robert R. Young, Mr. Allan P. Kirby and Mr. Andrew Van Pelt presently intend, if 6% Preferred Stock of the Corporation is offered and substantially all shares of Series A Pre-

ferred Stock are tendered in exchange therefor, to tender all of their holdings of Series A Preferred Stock in exchange therefor. If the Exchange Offer is consummated on a basis of less than substantially all shares of Series A Preferred Stock being tendered, such persons presently intend to tender approximately the same proportion of their holdings, as compared with the total number of such shares then outstanding, as are tendered by all other persons. It should be noted that, as indicated in the table set forth on page 6 hereof, the Common Stock and unexchanged shares of Series A Preferred Stock should benefit substantially in terms of available net assets per share as a result of the proposed exchange.

All Other Matters Which May Properly Come Before the Meeting

As of the date of this statement, the management knows of no business that will be presented for consideration at the meeting other than that which has been referred to above. As to other business, if any, that may properly come before the meeting, the proxies in the enclosed form will be voted in respect thereof in accordance with the judgment of the person or persons voting the proxies.

Additional Information

The enclosed proxies are being solicited by the management of the Corporation by authorization of its Board of Directors (the cost of the solicitation being paid by the Corporation. If a proxy in the accompanying form is duly executed and returned, the shares represented thereby will be voted and, where a specification is made by the stockholder on the ballot provided therein, will be voted in accordance with such specification. Any proxy given pursuant to this solicitation may be revoked by the person executing it at any time prior to its use at the meeting.

It is possible that the officers and regular employees of the Corporation may also, but without compensation (other than their regular compensation) solicit proxies by further mailing, personal conversations, or by telephone or telegraph, and the Corporation may reimburse brokerage firms and others for their expenses in forwarding solicitation material

for this meeting to the beneficial owners. In addition, The Kissel Organization, 25 Broad Street, New York, N. Y., has been engaged to solicit proxies for the meeting. Said firm will assign approximately thirty employees to solicit proxies. The anticipated cost of such solicitation made otherwise than by mail will be approximately $8,000.00, and will be paid by the Corporation.

By order of the Board of Directors.

Alleghany Corporation, By David W. Wallace, Secretary.

January 14, 1955.

[fol. 470] PEAT, MARWICK, MITCHELL & Co.

Certified Public Accountants

Seventy Pine Street, New York 5, N. Y.

The Board of Directors and the Stockholders,
Alleghany Corporation:

We have examined the balance sheet of Alleghany Corporation as of December 31, 1953 and the related statements of income, profit and loss on security transactions and surplus (deficit) for the three years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying balance sheet and statements of income, profit and loss on security transactions and surplus (deficit), with notes thereto, present fairly the financial position of Alleghany Corporation at December 31, 1953 and the results of its operations for the three years then ended, in conformity with generally accepted accounting principles applied in all material respects on a consistent basis.

Peat, Marwick, Mitchell & Co.

New York, N. Y., December 20, 1954

[fol. 471] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

REPLY TO AND MOTION TO DISMISS PETITION FOR LEAVE TO INTERVENE AND ACCOMPANYING MOTIONS OF LEWIS D. AND JOHN GILBERT—filed January 17, 1955

The Gilbert Motions and the supporting Statements show a complete lack of understanding of the decisions of the Commission and the Courts interpreting the Interstate Commerce Act, and the facts in the instant application.

I. Motion to Dismiss

In Paragraph I of the Statement in support of this Motion the petitioners urge that the Commission has no jurisdiction over the L & J Bridge application because Alleghany has no franchises or properties which are being merged with those of the Bridge Company. Consequently, petitioners assert, it "is not a valid party to this proposed inter-system merger of franchises and properties * * *." Contrary to this allegation the Commission must have jurisdiction over Alleghany or it cannot act on the application.

Under the decisions of the Courts and the Commission it is immaterial whether Alleghany has franchies or properties which are being merged with those of the Bridge Company. [fol. 472] Alleghany as a matter of law is required to join in the application of New York Central and the Big Four to control the properties and franchises of the Bridge Company as merged into the Big Four. The Commission and the Courts have repeatedly held that where a carrier subsidiary of a non-carrier corporation proposed to acquire control of another carrier's property (here the L & J Bridge Company), the non-carrier (here Alleghany) is a necessary

party and must join in the application or else the Commission is without authority to approve such control.*

In the next paragraph of their Statement, petitioners state that the doctrine of the *Marshall Transport* case is not applicable because "the proposed transaction gives Alleghany control over nothing not already in its orbit." The Commission held to the contrary in the *Chesapeake and Ohio Railway Company Purchase* case which arose out of petitions by C & O and Alleghany after the Supreme Court decision in the *Marshall Transport* case. The Commission said that "internal rearrangement of corporate structure"** must have Commission approval under Section 5(2) of the Act. In the *Nicholas, Fayette & Greenbrier* case, which also was decided after the *Marshall* decision, the Commission [fol. 473] held Alleghany was a necessary party, even though Alleghany through C & O already had control of the N.F.&G. and merely wanted to include within an existing lease an extension of line recently constructed by the N.F.&G.

The petitioners' Statement says that the Commission's Report and Order in *Chesapeake and Ohio Railway Purchase,* 261 I.C.C. 239, did not deal with Alleghany control of the properties of the Norfolk Terminal, and therefore is not a precedent for Alleghany joining the present application. A reading of the Commission's Report and Order, and particularly the language employed on pages 260 and 261,* demonstrates the contrary.

The Statement also asserts that, assuming Alleghany does not now control any carrier other than New York Central, the present application is not only unnecessary but the Commission has no jurisdiction to act upon it. This is merely a

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* *U.S.* v *Marshall Transport,* 332 U.S. 31; *Nicholas, Fayette & Greenbrier R.R. Co. Lease, etc.,* 261 I.C.C. 546, 547; *Chesapeake & Ohio Railway Company - Purchase,* 261 I.C.C. 239, 261; *Warrior & Gulf Nav. Co. Control,* 250 I.C.C. 26, 28; *United Parcel Service of Portland - Purchase - Wiese,* 37 M.C.C. 473, 475, and *Atchison, T. & S. F. Ry. Co. - Control - Santa Fe Trail Transp.,* 15 M.C.C. 469, 471.

** 261 I.C.C. 239, 260.

* Volume 261 of the I.C.C. Reports.

restatement of the prior erroneous conclusion that an internal rearrangement of control does not require an application under Section 5(2). As previously shown, this is contrary to all Commission decisions. Alleghany now controls New York Central and seeks authority to acquire control of the properties of the Bridge Company as merged into the Big Four. This is the very type of internal rearrangement that the Commission had before it in the *C. & O. Purchase* case and is comparable to the *N.F.&G.* case. Alleghany must join in this application or it would be defective. Accordingly, there is no basis whatsoever in fact or in law for the Motion to Dismiss.

[fol. 474] Petitioners then erect a straw man by saying that if the fact that the New York Central contains more than one company is asserted as a grounds for jurisdiction by Alleghany (which it is not), that Alleghany's counsel disposed of any such contention in a letter addressed to the Commission on April 16, 1954. As Alleghany's pleadings in this matter make abundantly clear, no such basis for jurisdiction is asserted.* Alleghany adheres to the view expressed in the letter quoted with approval by petitioners. As previously shown, Alleghany, as the non-carrier corporation controlling through Central the Big Four, *has* to join in the application to merge the properties of the L & J Bridge Company into the Big Four. It is a necessary party and without it the Commission would be without authority to approve the transaction. Petitioners' Motion to Dismiss for want of jurisdiction is completely without foundation and should be promptly dismissed.

II. Motion to Deny Application

The pleadings filed in the name of the Gilberts also contain a Motion to Deny the Application of Alleghany. The Statement in support of this Motion is on a par with that alleged to support the previous Motion to Dismiss.

The Statement opens with the same erroneous legal conclusion that the Commission has jurisdiction only if Alleghany is asking for permission to control New York Central and its constituent companies in contravention of the

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* See Alleghany letter to Director Boyden of December 15, 1954.

[fol. 475] position taken by Alleghany in its letter to the Commission of April 16, 1954 and in its oral argument before the Commission on May 14, 1954. To the contrary, we have shown that the Commission has jurisdiction because an internal rearrangement of control of the properties of the Bridge Company is proposed which must be approved by the Commission. Since the argument on the first page of this Motion is founded on a false legal premise, it is meaningless.

The second premise alleged for this Motion is equally in error. Petitioners state that "The exercise of such [New York Central System] control by Alleghany without approval from the Commission is clearly contrary to the language and spirit of Section 5 of the Interstate Commerce Act." This statement is not only contrary to the Commission's decision refusing to grant the Central's Petition for Declaratory Order (Finance Docket 31535) filed during the proxy contest which was based on the assumption that Alleghany had to obtain ICC authority before it could control the Central System, but this assertion by counsel Hyman on petitioners' behalf is diametrically opposed to a statement contained in their first Motion. On the fourth page of the first Motion, counsel Hyman, after quoting Alleghany's letter to the Commission on April 16 to the effect that it did not require prior approval to control the New York Ceneral System, concludes that "These views seem to have the support of both precedent and logic. Moreover, the Commission evidently accepted them at the time—however tacitly." Thus, this Motion to Deny rests on an assumption [fol. 476] of law that is not only incorrect under the Commission's decisions but counsel Hyman knew at the time he made it that it was incorrect and agreed that the assumption was contrary to logic as well as precedent. The Motion should be rejected as frivolous.

On the basis of the erroneous assumption that Alleghany required Commission approval to control the New York Central System, petitioners further urge that to approve the present application under such circumstances would exceed the Commission's authority and would encourage disregard of the laws of the United States. Not only is the premise for such a statement false and contrary to statements of petitioners' own counsel as previously shown, but the assertion

that the Commission lacks jurisdiction in such a case is squarely contradicted by the Commission's decision in the *C & O Railway Purchase* case.

Petitioners then quote from the *James Foundation* case* and conclude from the quoted language that for Alleghany to take control of the New York Central without prior approval of the Commission would be illegal. Petitioners completely ignore the fact that the Court's finding that Alleghany would have violated Section 5 in obtaining control of the Western Pacific without prior approval of the ICC was based upon Alleghany's then existing control of the C & O. Since Alleghany no longer controls the C & O there is nothing in the decision in the *James Foundation* case which would make Alleghany's acquisition of control of New York Central a violation of Section 5. Petitioners' statement then goes on to ask for an investigation to determine [fol. 477] whether Alleghany continues to control the C & O. As this Commission well knows, such an investigation was conducted and completed last year. Alleghany completely divested itself of control of the C & O and has neither held the power nor exercised the power to control C & O for more than a year.

The petition concludes with a request that the Commission, should it approve Alleghany's application, impose as a condition a requirement for cumulative voting for directors. Such a requirement is completely irrelevant and immaterial to any issue presented to the Commission by the instant application. It is a matter for decision by the state of incorporation and the stockholders of the two corporations. Messrs. Gilbert can raise this issue in connection with the annual meeting of the stockholders of Alleghany and New York Central.

In view of the complete lack of legal or factual basis for the Motions filed by petitioners and the rather obvious fact that the entire pleadings were filed in an effort to secure cumulative voting in the election of directors of Central and Alleghany, either by order of the Commission or agreement by Alleghany and Central management, it is respectfully requested that the Commission deny the Petition for Leave

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* *Alleghany* v. *The James Foundation*, 214 Fed. 2nd 446.

to Intervene and the two Motions. As Alleghany and Central have previously advised the Commission, matters of the [fol. 478] utmost importance to the welfare of both companies are being delayed awaiting a decision on the application in this docket.

Respectfully submitted, Alleghany Corporation By Burton K. Wheeler, Edward K. Wheeler, Its Counsel.

January 17, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 479] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

PETITION OF BRESWICK & COMPANY FOR LEAVE TO INTERVENE —filed February 4, 1955

Come now your petitioner, Breswick & Company, by its attorney and respectfully represents that it has an interest in the matters in this controversy in the above entitled proceedings and desires to intervene and become a party thereto. For grounds of intervention, the petitioner says:

I. That the petitioner is an independent investor and stockholder in the Alleghany Corporation and the New

York Central Railroad Company, with its address at 120 Walker Street, New York, New York.

II. That the application by Alleghany Corporation pending in Finance Docket No. 18656 has been filed by Alleghany in an effort to avoid regulation by the Securities and Exchange Commission in accordance with the Investment Company Act, an act intended for the protection of both investors in investment companies, such as Alleghany Corporation, and investors in companies, such as the New York Central Railroad Company, whose securities may be acquired, and whose affairs may be dominated by an investment company.

III. That the question of whether Alleghany Corporation is to be subject to the regulation of the Interstate Commerce Commission or the Securities and Exchange Commission has been raised by the Securities and Exchange Commission in its memorandum dated September 14, 1954, and is at issue in this proceeding; and that the resolution of this issue is of great importance to petitioner and all other investors in Alleghany Corporation.

IV. That the question of control of the New York Central Railroad Company by Alleghany Corporation is, or may be, at issue in this proceeding and that the resolution of this issue is of great importance to petitioner and all other investors in the New York Central Railroad Company.

Wherefore, the petitioner prays that the Commission grant it leave to intervene in and file the accompanying motion to deny the application as to Alleghany Corporation if the Commission takes jurisdiction to join in the motions filed with the Commission in Finance Docket No. 18656 on behalf of Lewis D. Gilbert and John Gilbert, and to be treated as parties hereto with the right to have notice of and appear at any hearing or other proceedings that may be had herein, to take testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief or oral argument, and that the petitioners have such other

and further relief as in the premises may be proper. Oral argument is requested.

Dated: 4 February 1955

Respectfully submitted, Joseph B. Hyman, Attorney for Petitioners, 211 South Pitt Street, Alexandria, Virginia.

[fol. 480] MOTION TO DENY THE APPLICATION ETC.

Motion of Breswick & Co. to deny for violations of the Investment Company Act and Sections 5(2)(b) and 5(4) of the Interstate Commerce Act the application of Alleghany Corporation for Control of the Properties and Franchises of the Louisville & Jeffersonville Bridge & Railroad Company or of the New York Central Railroad Company and/or any of its constituent companies.

Comes now Breswick & Co., a stockholder in both the Alleghany Corporation and the New York Central Railroad Company, by its attorney and respectfully moves the Commission to deny the application of Alleghany Corporation in this proceeding for control of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company or of the New York Central Railroad Company and/or any of its constituent companies.

Your petitioner submits the following statement in support of this motion.

[fol. 481] Statement

I. The S.E.C. order of October 4, 1945 and this Commission's order of June 5, 1945 became null and void on and after January 19, 1954, during which time Alleghany was required to register under the Investment Company Act, or cease all business in interstate commerce.

(a) The Order of June 5, 1945

On June 5, 1945 this Commission approved and authorized in Finance Docket No. 14692 the acquisition by Alleghany Corporation of Control of the Chesapeake & Ohio Railway

Company; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railroad Company and their subsidiaries and affiliates.

At no time thereafter has this Commission authorized Alleghany Corporation to acquire control of any other carriers.

Solely as a result of said authorization of June 5, 1945 the Alleghany Corporation was considered as a carrier by this Commission and became subject to regulation under the Interstate Commerce Act.

On January 19, 1954 the Alleghany Corporation divested itself of control of the Chesapeake & Ohio and its carrier affiliates and subsidiaries. Prior thereto Alleghany Corporation divested itself of control of the other carriers above-mentioned.

As a result of said divestments the Alleghany Corporation, after January 19, 1954, was not lawfully subject to regulation under the Interstate Commerce Act, nor was it in fact or law a carrier subject to any section of said Act.

As a result of said divestments the order of June 5, 1945 automatically expired on January 19, 1954 and no longer had any legal force or effect.

(b) The Order of October 4, 1945

The S.E.C. order of October 4, 1945 (20 S.E.C. 731) terminating Alleghany's registration under the Investment Company Act because it was then "subject to regulation under the Interstate Commerce Act" automatically became null and void on and after January 19, 1954 by reason of the facts above set forth.

[fol. 482] Alleghany's failure to register with the S.E.C. under the Investment Company Act or otherwise to comply with that Act on and after January 19, 1954 was not in good faith since Alleghany knew and has admitted in these proceedings by letter of counsel dated January 28, 1954 that there was no longer any jurisdictional basis for the I.C.C. order of June 5, 1945.

Moreover the exemption provided in Section 3(9) of the Investment Company Act of "any company subject to regulation under the Interstate Commerce Act" should not be held to apply to Alleghany since the words "subject to

regulation" properly construed mean "subject to the plenary regulation" of this Commission under the Interstate Commerce Act and not "subject to regulation only pursuant to Section 20(1) to (10) inclusive and Section 20a(2) to (11) inclusive."

(c) The Admissions of Alleghany's Counsel

That part of this Commission's order of June 5, 1945 holding "That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier, etc." became null and void after January 19, 1954 by reason of the facts above set forth.

These contentions have been admitted by Alleghany's counsel, on two occasions in the present proceedings: (1) In their reply to and motion to dismiss the petition herein, they stated under date of January 17, 1955 that Alleghany is a "non-carrier", page 2, lines 5 and 6, and page 4, line 8; and (2) In their letter to this Commission dated January 28, 1954, they stated: "The conditions surrounding the authorization of Alleghany to control Chesapeake & Ohio depended upon continued control of Chesapeake & Ohio. They were co-extensive in time with such control and did not endure after Alleghany ceased to exercise the authority granted it by the Order. Etc." This position, they asserted, "is not only sound but is also quite beyond the possibility of controversy or dissent."

It necessarily follows from the above facts that this Commission's reservation of jurisdiction over Alleghany Corporation and any exercise of jurisdiction after January 19, [fol. 483] 1954 is arbitrary and capricious, unsupported by substantial evidence, and in violation of the Interstate Commerce Act and the Administrative Procedure Act.

At no time from January 20, 1954 to June 13, 1954 was the Alleghany Corporation a carrier subject to the jurisdiction of this Commission. During said period of time and on and after January 19, 1954 Alleghany Corporation was an investment company within the meaning of Section 3(a)(1) and (3) of the Investment Company Act of 1940 and as such was required to register with the S.E.C. under Section 8 of the

Investment Company Act, or cease all corporate activity in interstate commerce. (Section 7(a)(2) and (4).)

In the absence of such registration Alleghany Corporation was required to comply with Section 7(a) of said Act, which prohibits any unregistered investment company from buying or selling any securities, engaging in any business in interstate commerce or controlling any company which is engaged in any business in interstate commerce. See (2), (3), (4), and (5) of Section 7(a).

In spite of this prohibition, during the period January 19, 1954 to June 13, 1954, the Alleghany Corporation and its nominees Robert R. Young, Allan P. Kirby and the 13 other present members of New York Central's Board of Directors (except Alfred E. Perlman) by stock purchases and the solicitation of proxies and other acts in interstate commerce sought to acquire and did acquire control of the applicant railroad and bridge companies herein.

By reason of said prohibited and unlawful acts Alleghany Corporation and its nominees were successful in acquiring on June 14, 1954 the control of the New York Central Railroad Company and its system companies, and since June 14, 1954 Alleghany and its nominees have taken further steps by stock purchases and otherwise to consummate and consolidate their control, including the appointment of various officers and counsel of Alleghany as officers and counsel of New York Central.

[fol. 484] In such circumstances this Commission can not approve the present application of the Alleghany Corporation, since it would constitute legalization of Alleghany's unlawfully secured control of the New York Central Railroad Company and its system companies, and any such legalization would be in violation of section 5(2)(b) of the Interstate Commerce Act and Section 5(4), which require that any acquisition of control be made by lawful and just means and be in the public interest. See *Alleghany Corporation* v. *James Foundation*, 214 F.2d 446, 450.

II. If Alleghany is held to be a carrier during the period January 19, 1954 to date, Young and Kirby and their associates have acquired control of two carriers or more in violation of Section 5(4) of the Interstate Commerce Act.

If this Commission determines that the order of June 5, 1945 was not null and void from January 19, 1954 to June 13, 1954, and is not since then to date null and void, it automatically follows that during said period and at present Alleghany is a carrier, since said order recites "That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier."

Alleghany Corporation is controlled by Robert R. Young and Allan P. Kirby and their nominees. Said Young and Kirby by reason of (a) their stockholdings in Alleghany; (b) their control of Alleghany's Board of Directors and officers; (c) their purchase of stockholdings in New York Central; (d) Alleghany's purchase of stockholdings in New York Central; (e) their and Alleghany's nomination and election of the other 13 members of the Board of New York Central, and (f) the appointment of Alleghany's officers and counsel as officers and counsel of the New York Central, have within the meaning of Section 1(3)(b) and Section 5(4) of Part I of the Interstate Commerce Act, accomplished, effectuated or participated in accomplishing or effectuating the control or management or the power to exercise control or management in a comomn interest of two or more carriers.

[fol. 485] The Chesapeake & Ohio Railway Company, Clinton W. Murchison, Sid W. Richardson and Murchison Brothers have by purchases and sales of New York Central stock, by execution of proxies and their solicitation directly or through officers and employees of companies controlled by them, by joint venture agreements with Alleghany Corporation, by election to the New York Central board of directors, and by other means, have participated with said Young and Kirby in accomplishing or effectuating the control or management in a common interest of the above-mentioned carriers.

The acts above set forth are transactions within the scope of clauses three, four and five of subparagraph (a)(i) of paragraph (2) of Section 5 of the Interstate Commerce Act. Said acts are and were, consequently, in violation of Section 5(4) of the Interstate Commerce Act.

This Commission, in view of the violations of Section 5(4), has no power to authorize the applications herein, since this

would in effect legalize the control illegally obtained by Young, Kirby, their nominees, and Alleghany Corporation of the New York Central Railroad Company and its system companies. Such a course would be neither just nor reasonable nor consistent with the public interest as required by Section 5(2)(b).

The pending applications are incomplete, moreover, by virtue of the failure of said Young and Kirby to apply for approval of their control of Alleghany Corporation and the New York Central System, as required by Section 5, as indicated above.

Wherefore, your petitioner asks the Commission to dismiss the application of Alleghany Corporation. Oral argument is requested.

Respectfully submitted, Joseph B. Hyman, Attorney for Petitioner, 211 South Pitt Street, Alexandria, Virginia.

[fol. 486] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 487] BEFORE THE INTERSTATE COMMERCE COMMISSION

Division 4.

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

ORDER DENYING PETITION OF LEWIS D. GILBERT, ET AL. FOR LEAVE TO INTERVENE—February 9, 1955

It appearing, That on September 20, 1954, an application was filed by (1) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (Big Four) and the Louisville & Jeffersonville Bridge and Railroad Company (bridge company) to merge their properties and franchises, (2) the Big Four, as lessor, and The New York Central Railroad Company (Central), as lessee, to modify the provisions of their lease of January 2, 1930, to include the properties of the bridge company, (3) Central and Alleghany Corporation

to acquire, in view of the latter's control of Central and Central's control of the Big Four, control of the properties and franchises of the bridge company; and requesting an order of this Commission containing, among other things, a provision that Alleghany Corporation (Alleghany) shall continue to be considered a carrier subject to the provisions of sections 20(1) to (10) inclusive and 20a(2) to (11) inclusive of the Interstate Commerce Act, as previously provided in our order of June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239, in which we retained jurisdiction to make such further order or modification of the order as might thereafter be necessary or appropriate.

It further appearing, That, by orders dated September 24, and 30, 1954, and December 20, 1954, the United States Securities and Exchange Commission (S.E.C.) was permitted to intervene in the above-entitled proceedings for the limited purpose of filing its memorandums dated September 14, 1954, and December 14, 1954, in opposition to this Commission's finding that Alleghany Corporation to be a carrier subject to sections 20(1) to (10), inclusive, and 20a(2) to (11), inclusive, of the Interstate Commerce Act, as provided by section 5(3) thereof; that the said memorandums were filed pursuant to permission granted by the said orders; and that Alleghany and Central filed replies.

It further appearing, That on January 11, 1955, Lewis D. Gilbert and John Gilbert, independent investors and stockholders in Alleghany and Central, filed a petition for leave to intervene in the above entitled proceeding, asserting that the said proceeding was filed by Alleghany solely to avoid regulation by the S.E.C. under the Investment Act of 1940; that in the said proceeding the question of the exercise of jurisdiction to regulate Alleghany is at issue, and its determination is of great importance to the petitioners and other investors in Alleghany; and further asserting that the question of control of Central is, or may be at issue in this proceeding, and that determination of that issue is of great importance to the petitioners and other investors in Central.

[fol. 488] *It further appearing*, That the said petition to intervene is accompanied, for filing, by the petitioners' motion to dismiss the application as to Alleghany for want

of jurisdiction; and, if we take jurisdiction of the matters involved therein, an alternative motion to deny the application as to Alleghany; and the petitioners request oral argument on the petition for leave to intervene, and upon each motion.

It further appearing, That the motion to deny the application includes the further request that in the event the application is granted it be conditioned upon an amendment of the charters or by laws of the Alleghany and Central to provide for cumulative voting by stockholders in the election of directors for those companies.

It further appearing, That, on January 17, 1955, Alleghany filed its reply to the said petition for leave to intervene and to the motions attached thereto.

It further appearing, That the interests of the said petitioners are not shown to pertain to the terms and conditions of the proposed merger, modification of lease, and resulting internal rearrangement of the applicants' corporate structure, and are not shown to be different from the interests of all other holders of the same classes of stock of Alleghany and Central.

It further appearing, That consideration and disposition of the issues presented in the above-entitled proceeding do not require determination of indirectly related matters which the petitioners allege might raise other issues affecting the interests of investors and stockholders in Alleghany and Central.

And it further appearing, That the said petition and motions, in part, contemplate a broadening of the issues in the proceeding herein, beyond the jurisdiction conferred upon this Commission by the Interstate Commerce Act.

It is ordered, That the said petition for leave to intervene for the purpose of filing the proposed motions in the above-entitled proceeding, and the requests for oral argument, be, and they are hereby, denied.

By the Commission, division 4.

George W. Laird, Secretary.

(Seal.)

[fol. 489] [File endorsement omitted]

BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

ALLEGHANY CORPORATION'S REPLY TO AND REQUEST FOR DISMISSAL OF PETITION FOR LEAVE TO INTERVENE AND MOTION TO DENY APPLICATION—filed February 10, 1955

Applicant wishes to state that it believes and therefore asserts that Joseph B. Hyman or a person acting in concert with him, probably a disgruntled former employee of Alleghany, is attempting to use the application of New York Central and Alleghany in this matter as a basis for harrassing Alleghany and New York Central.

Petitioner states that it is a stockholder in both the Alleghany Corporation and the New York Central Railway Company. The official records of these companies indicate the contrary. According to Alleghany's records Breswick & Company of 120 Walker Street, New York, New York purchased 100 shares of Alleghany in October, 1946 but *sold* or transferred them on January 9, 1955. According to the New York Central records Breswick & Company purchased 100 shares in October, 1946 but *sold* or transferred them on December 31, 1954. Thus the only alleged basis of petitioner's interest in this matter has ceased to exist and the petition should therefore be dismissed.

[fol. 490] Even if petitioner had a sufficient interest in this matter and could show that it would be affected materially by the applications pending before the Commission, the petition should be denied for want of substance.

Just as the prior petitions and motions filed by Mr. Hyman were founded on a complete misinterpretation of the law and the Commission's decisions, so the present petition,

motion and the statement in support of the motion are based on a similar misconception. Thus the Statement, on which alone the Petition for Leave to Intervene and Motion rests, opens with the false assertion that the SEC Order of October 4, 1945 and the ICC Order of June 5, 1945 became null and void on and after January 19, 1954 because on that date Alleghany divested itself of control of the Chesapeake and Ohio Railway Company. The magnitude of the error in this assertion is immediately apparent from the Order of the ICC of June 5, 1945, which states that "*It is further ordered* that *unless and until otherwise ordered* by this Commission said Alleghany Corporation shall be considered as a carrier * * *." (Italic added) The Commission's findings in its report were to the same effect and stated that it retained "jurisdiction to make such further order or modification of the order * * * as may hereafter be necessary or appropriate," 261 ICC 239, 262, Report and Order in Finance Docket 14692. Since the Commission has not "otherwise ordered," Alleghany's status as a carrier continues to this date. It did not, as asserted by Mr. Hyman, "automatically expire on January 19, 1954." As a matter of fact, the Commission's Order to Show Cause in this docket issued [fol. 491] under date of June 22, 1953, which recites the above quoted language from its Order of June 5, 1945, clearly recognizes the continuation of Alleghany's status as a carrier until the Commission issues an order revoking such status. Were this not true, the Commission would have had no reason for entering its Order of June 22, 1954.

The SEC memorandum of September 14, 1954 in this docket, in its Conclusion, likewise recognizes that Alleghany's status as a carrier will continue until the ICC Order of June 5, 1945 is revoked and the ICC declines to enter any new order declaring Alleghany to be a "carrier" subject to regulation under the Interstate Commerce Act.

Hyman's second contention in his Statement that the SEC Order of October 4, 1945 terminating Alleghany's registration under the Investment Company Act became null and void on and after January 19, 1954 is equally false and contrary to all decisions and orders of the ICC and the SEC. The 1945 order of the SEC concluded as follows: "We con-

clude that Alleghany is subject to regulation under the Interstate Commerce Act.

"It follows that Alleghany is, by virtue of Section 3(c)(9), excepted from the definition of an investment company within the meaning of the Investment Company Act of 1940 and is entitled to an order declaring that it has ceased to be an investment company. If at any time in the future Alleghany ceases to be so subject to regulation under the Interstate Commerce Act, this order may be revoked, suspended and modified after appropriate notice and opportunity for hearing."

While such a notice of hearing was issued by the SEC under date of July 7, 1954, the hearing has been postponed [fol. 492] from time to time pending action by the Interstate Commerce Commission. The SEC, both by its 1945 order and its orders and actions in 1954, has recognized that Alleghany continues to be a carrier and subject to regulation under the Interstate Commerce Act until the ICC otherwise orders. Both the ICC and the SEC have acknowledged by act and order that Alleghany's status as a carrier will continue until the ICC issues an order revoking or modifying its Order of June 5, 1945. The Hyman Statement is completely contrary to all decisions and orders of the ICC and the SEC and accordingly the petition should be denied.

The next heading in the Statement is labelled "The Admissions of Alleghany's Counsel." No comment on the assertions in this part of the Statement is necessary since they are predicated solely on the erroneous legal conclusion that Alleghany's status as a carrier ceased to exist on January 19, 1954.

Hyman next assumes a contrary position and premise on page 4 of his Statement, and says that if Alleghany is to be held a carrier since January 19, 1954, "Young and Kirby and their associates have acquired control of two carriers or more in violation of Section 5(4) of the Interstate Commerce Act." This and the subsequent paragraphs of the Statement, if susceptible of clear interpretation, seem to be a rehash of the decisions urged by the old New York Central management in their Petition for Declaratory Order in Finance Docket 31535 which the Commission denied on May

19, 1954. This line of argument was also answered in applicant's attorneys' letter to Director Boyden under date of December 15, 1954.

[fol. 493] If, on the other hand, Hyman is urging on page 4 of his Statement that Young and Kirby would violate Section 5(4) if they controlled New York Central while at the same time controlling Alleghany because Alleghany is a "carrier," he has failed to read Section 5(3) of the Interstate Commerce Act or the Order of the Commission of June 5, 1945 which says that a person not a carrier when authorized to control one or more carriers shall be considered a carrier subject to Sections 20(1) to (10) and 20a(2) to (11), inclusive. Alleghany thus is not a "carrier" for purposes of Section 5(4).

In view of both the demonstrated failure of petitioner to show that it materially will be affected by the proposed transactions and the complete lack of any legal substance in the Statement on which its petition rests, it is submitted that the petition and motion must be dismissed.

Respectfully submitted, Alleghany Corporation, by Edward K. Wheeler, Its Attorney.

February 10, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 494] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 495] EXHIBIT 18

ALLEGHANY CORPORATION

4500 Chrysler Building, New York 17, N. Y.

Exchange Offer

of

Alleghany Corporation's

6% Convertible Preferred Stock

for

Alleghany Corporation's

Cumulative 5½% Preferred Stock Series A

[fol. 496] EXCHANGE OFFER

ALLEGHANY CORPORATION

4500 Chrysler Building, New York 17, N. Y.

February 10, 1955.

To the Holders of Cumulative 5½% Preferred Stock Series A:

Alleghany Corporation, a Maryland corporation (herein sometimes called the "Corporation"), hereby invites, subject to the approval of the Interstate Commerce Commission as set forth below, holders of its Cumulative 5½% Preferred Stock Series A of the par value of $100 per share (herein referred to as "Series A Preferred Stock"), to exchange all of such shares outstanding for Alleghany Corporation's 6% Convertible Preferred Stock of the par value of $10 per share (herein referred to as "6% Preferred Stock") on the following basis:

Each share of Series A Preferred Stock ($100 par value) may be exchanged for ten shares of 6% Convertible Preferred Stock ($10 par value) on the basis and in accordance with the detailed terms and conditions set forth herein.

The proposed plan for the issuance of 6% Preferred Stock in exchange for shares of Series A Preferred Stock as well as the issuance and sale of Common Stock by the Corporation upon conversion of said 6% Preferred Stock requires the approval of the Interstate Commerce Commission. Consequently, the Exchange Offer is made subject to the condition that the Interstate Commerce Commission shall issue the necessary authorization not later than May 31, 1955. An application for such approval is currently being filed with the Interstate Commerce Commission.

The Exchange Offer is also made by the Corporation subject to the further condition that not less than 100,000 shares of Series A Preferred Stock be surrendered for exchange. However, the Corporation reserves th right to consummate the Exchange Offer upon surrender for exchange of a lesser number of shares of Series A Preferred Stock.

1,367,440 shares of 6% Preferred Stock, par value $10 per share, have been authorized for issuance in exchange for 136,744 shares of Series A Preferred Stock, par value $100 per share, subject to Interstate Commerce Commission approval as set forth above.

The Corporation has authorized Common Stock in the amount of 22,000,000 shares, of which, as of January 31, 1955, 4,641,585 shares were issued and outstanding, 410,032 shares were reserved for issuance upon conversion of the presently outstanding $4 Prior Preferred Stock, 1,999,700 shares were reserved for issuance upon exercise of the presently outstanding Common Stock Subscription Warrants of the Corporation and 100,000 shares were reserved for issuance upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of Common Stock, to be sold to directors, officers and employees of the Corporation, upon exercise of options or otherwise, [fol. 497] but such shares have not yet been sold, options covering such shares have not yet been granted and such shares have not been reserved.

Details of the Exchange Offer

The Exchange Offer is open to all holders of Series A Preferred Stock of the Corporation until 3:30 P.M. Eastern Standard Time (or until 3:30 P.M. Eastern Daylight Saving Time, if such time is then in effect in the City of New York) on the "Closing Date", which term shall mean the fifth day (excluding Saturday, Sunday and any legal holiday) after the Interstate Commerce Commission shall have issued, not later than May 31, 1955, an order substantially in the form requested approving the issuance by the Corporation of the 6% Preferred Stock and the issuance and sale by the Corporation of the Common Stock issuable upon the conversion of said 6% Preferred Stock. Any holder of Series A Preferred Stock may accept this Exchange Offer on or before the Closing Date by depositing for exchange all or any number of shares of such stock held by him.

Series A Preferred stockholders may revoke their acceptance of this Exchange Offer and direct the return of the deposited shares by giving written notice thereof to the Exchange Agent named hereinafter at any time prior to the Closing Date.

As soon as practicable after the Closing Date, if 100,000 shares of Series A Preferred Stock, or such lesser number as the Corporation may deem sufficient to warrant consummation of the Exchange Offer, have been duly submitted for exchange, the Corporation will issue and deliver stock certificates representing the required number of shares of 6% Preferred Stock in temporary form and in accordance with the instructions set forth in the Letters of Transmittal which accompany the stock certificate(s) surrendered for exchange.

The Corporation may, at its election, extend the Exchange Offer. If any such extension of the Exchange Offer is made, the Corporation will, promptly after the Closing Date, so notify its remaining Series A Preferred stockholders. Thereafter, any holder of unexchanged Series A Preferred Stock may exchange any or all of his remaining shares. The Corporation reserves the right further to extend the Exchange Offer for an additional period or periods. Regardless of such possible extension or extensions, the conversion rights of the 6% Preferred Stock shall be fixed as of the

Closing Date, as above defined and all shares tendered for exchange on or before the Closing Date will be exchanged as of such date.

If the Corporation determines not to consummate the Exchange Offer because less than 100,000 shares of Series A Preferred Stock have been duly submitted for exchange, or if the Interstate Commerce Commission shall not have issued, on or before May 31, 1955, an appropriate order granting the Corporation's application for approval of the issuance of the 6% Preferred Stock and Common Stock upon the exercise of the conversion privilege, or if the Interstate Commerce Commission shall issue an order denying any material portion of the Corporation's application, then, in any such case, this Exchange Offer shall be void and of no effect and the Corporation will instruct the Exchange Agent to return to each Series A Preferred stockholder the stock certificate(s) delivered by such stockholder to the Exchange Agent.

This Exchange Offer is not subject to any conditions other than (i) the issuance of an appropriate order by the Interstate Commerce Commission and (ii) its acceptance by holders of Series A Preferred Stock to the extent of 100,000 shares of such stock, or such lesser number as the Corporation may elect, all as set forth above. All shares of Series A Preferred Stock which are exchanged in accordance with this Exchange Offer will be retired by the Corporation. All costs and expenses of the exchange (other than transfer taxes, if any, and expenses, if any, of stockholders in delivering their shares to the Exchange Agent in accordance with the provisions of the Letter of Transmittal) will be borne by the Corporation.

Method of Effecting Exchange

Stockholders desiring to effect the exchange under the Exchange Offer should execute the accompanying Letter of Transmittal and forward the same, together with stock cer- [fol. 498] tificates covering the shares to be exchanged in proper form as required for transfers on the New York Stock Exchange, to The Marine Midland Trust Company of New York, Exchange Agent, 120 Broadway, New York 5,

New York. Signatures of the registered holders on stock certificates or on stock transfer powers must be guaranteed.

Stockholders may also deliver the executed Letter of Transmittal, together with stock certificates covering the shares to be exchanged by such stockholders, in proper form as required for transfers on the New York Stock Exchange, to any firm which is a member of the New York Stock Exchange or a member of the American Stock Exchange Securities Clearing Corporation or to any bank or trust company having an office or a correspondent in the Borough of Manhattan, The City of New York, for transmission to the Exchange Agent. However, the stock exchange firm, bank or trust company to which any such delivery is made must promptly notify the Exchange Agent, in writing or by telegram, of its receipt from such stockholder of said Letter of Transmittal and stock certificates, indicating the name and address of the registered owner of the shares and of the signer of the Letter of Transmittal and the number of shares offered for exchange under the Exchange Offer, and such stock exchange firm, bank or trust company must forward said Letter of Transmittal and stock certificates promptly to the Exchange Agent. In order to assure his participation in the exchange, each stockholder desiring to accept the Exchange Offer must arrange to have his Letter of Transmittal and properly endorsed stock certificates (or the notification sent by the stock exchange firm, bank or trust company) delivered to the Exchange Agent not later than 3:30 P.M. on the Closing Date. No stock transfer taxes are payable upon the exchange of shares of Series A Preferred Stock, provided that the 6% Preferred Stock certificates are all issued to the registered holder of the shares surrendered.

Dealer Manager and Dealers' Participation

The Corporation has entered into an Agreement with Kidder, Peabody & Co. (herein called the "Dealer Manager"), whereby the Dealer Manager agrees to use its best efforts to form and manage a group of securities dealers, including itself, all of whom are either members of the National Association of Securities Dealers, Inc., or, if foreign dealers not eligible for membership in said Association, have agreed to

conform to the Rules of Fair Practice of such Association, to solicit acceptances of the Exchange Offer by holders of Series A Preferred Stock.

All dealers so qualified are invited to become members of such group by entering into a Soliciting Dealer's Agreement with the Dealer Manager and to solicit on behalf of the Corporation acceptances by Series A Preferred stockholders of this Exchange Offer. For such services, dealers who are members of such group, including the Dealer Manager, will receive, where such a fee may properly be paid, a commission of $1.00 for each share of Series A Preferred Stock submitted through them to the Exchange Agent and exchanged in accordance with the Exchange Offer; provided, however, that the maximum aggregate commissions payable with respect to any single exchanging holder will be $300, except in certain cases in which the stock is beneficially owned by others.

The Dealer Manager will be reimbursed for its out-of-pocket expenses up to, but not in excess of, $2,000, and if the Exchange Offer is consummated, will receive the additional sum of $10,000 as a flat fee for its services. All fees, expenses and commissions are to be paid by the Corporation. The Corporation itself will not solicit exchanges under the Exchange Offer. Solicitations are authorized to be made only by dealers or their salesmen qualified to act in their respective states.

The Dealer Manager is not authorized to act as agent of the Corporation. Soliciting Dealer's Agreements, entered into between the Dealer Manager and soliciting dealers, will provide that soliciting dealers are not authorized to give any information or to make any representations in connection with the Exchange Offer other than as contained herein and in other authorized solicitation material, if any, and will provide further that soliciting dealers are not authorized to act as agents of the Corporation or of the Dealer Manager.

[fol. 499] Description of 6% Preferred Stock and Comparison with Series A Preferred Stock

The shares of 6% Preferred Stock offered hereunder are authorized but unissued shares of such stock. The Board of Directors of the Corporation at a Special Meeting held

December 28, 1954 resolved that it was advisable that the Certificate of Incorporation of the Corporation be amended so as to create 1,367,440 shares of a new class of Preferred Stock to be known as 6% Convertible Preferred Stock, $10 par value per share, to be junior to the class of $4 Prior Preferred Stock of the Corporation and senior to the existing class of Preferred Stock (of which Series A Preferred Stock is a series) and the Common Stock, and to increase the authorized shares of Common Stock from 12,350,000 shares to 22,000,000 shares so as to provide sufficient shares for issuance upon conversion of said 6% Preferred Stock, and directed that such proposed Amendment be submitted for action at the Special Meeting of Stockholders of the Corporation held February 8, 1955. At such meeting, as required by the Certificate of Incorporation of the Corporation, the holders of two-thirds of the outstanding shares of the $4 Prior Preferred Stock and the holders of a majority of the outstanding shares of the Series A Preferred Stock and the Common Stock, voting as separate classes, approved the proposed Amendment. Appropriate Articles of Amendment of the Certificate of Incorporation to create said 1,367,440 shares of 6% Preferred Stock and to increase the authorized shares of Common Stock to 22,000,000 shares were duly filed with the State Tax Commission of the State of Maryland on February 8, 1955.

The provisions of Article SIXTH of the Certificate of Incorporation, as so amended, which set forth the preferences, voting powers, restrictions and qualifications of the 6% Preferred Stock, are as follows:

"(q) The holders of the 6% Convertible Preferred Stock shall be entitled to receive, when and as declared by the Board of Directors, dividends from the net earnings of the Corporation or from its surplus, at the rate of six per cent per annum, and no more, upon the par value thereof, payable semi-annually on the first day of each April and October. Such dividends shall be cumulative from May 1, 1955, and such dividends shall be paid or declared and set apart for payment in due course before any dividends shall be paid or set apart for payment upon the Preferred Stock or the Common Stock of the Corporation, so that if, for any semi-

annual dividend period, the dividend on the 6% Convertible Preferred Stock at the rate of 6% per annum shall not have been paid, or declared and set apart for payment in due course, the deficiency shall be fully paid, or set apart for payment in due course, before any dividend shall be paid or set apart for the Preferred Stock or the Common Stock of the Corporation. The holders of the 6% Convertible Preferred Stock shall not be entitled to receive any dividends or share in the profits beyond the six per cent aforesaid, whether payable in cash, stock, or property.

"(r) In the event of the voluntary liquidation or dissolution of the Corporation, except as provided in Article Tenth of the Charter of the Corporation, or in the event of the sale of substantially all of the assets of the Corporation, the holders of the 6% Convertible Preferred Stock then outstanding shall be entitled to receive, out of the assets (whether capital or surplus) of the Corporation, before any payment shal be made to the holders of the Preferred Stock or the Common Stock of the Corporation, an amount equal to 105% of the par value of their respective shares, and all dividends accumulated and unpaid thereon, whether or not earned or declared. In the event of the involuntary liquidation or dissolution of the Corporation, the holders of the 6% Convertible Preferred Stock then outstanding shall be entitled to receive out of the assets (whether capital or surplus) of the Corporation, an amount equal to the par value of their respective shares, and all dividends accumulated and unpaid thereon, whether or not earned or declared. After payment in full in either such case of said amounts to the holders of said 6% Convertible Preferre Stock, the remaining assets of the Corporation shall be distributed to the holders of the Preferred Stock or the Common Stock according to their respective rights.

"(s) At any time subsequent to May 1, 1970, but not before, the 6% Convertible Preferred Stock at the time outstanding, or from time to time any amount thereof, may be redeemed, at the option of the Corporation, by the payment in cash for each share of such stock so redeemed an amount equal to one hundred and five per cent (105%) of the par value thereof and the amount of all dividends accumulated and unpaid thereon at the redemption date, whether or not

earned or declared; provided, however, that notice of the [fol. 500] time and place of redemption shall be given to the holders of record of such stock to be redeemed, which notice shall be given by mail in such manner as shall be prescribed by resolution of the Board of Directors, such mailing to be not less than thirty days previous to the redemption date. If less than all the outstanding shares of stock are to be redeemed, such redemption shall be made ratably according to the several holdings thereof, or as nearly ratably as may be without redeeming fractions of shares, as in such respect and any other respects shall be determined at the time by the Board of Directors. From and after the date of redemption specified in such notice (unless default be made by the Corporation in duly paying the redemption price), the holders of the shares designated for such redemption shall cease to have on account thereof any right except the right to receive without interest the redemption price. However, the Corporation may, at any time, purchase from any holder thereof any of the 6% Convertible Preferred Stock to the extent now or hereafter permitted by law.

"(t) The Board of Directors of the Corporation may offer, at such times as it deems advisable, to the holders of the Corporation's Series A Preferred Stock, on the basis of ten shares of 6% Convertible Preferred Stock for each share of the Corporation's Series A Preferred Stock, 1,367,440 shares of the Corporation's 6% Convertible Preferred Stock. The actual value of the said Series A Preferred Stock for such purpose is hereby declared to be its voluntary liquidating value, namely, $105.00 per share, plus all dividends accumulated and unpaid thereon to May 1, 1955, which value is also declared to be ten times the value on the same date of each share of the said 6% Convertible Preferred Stock. The Corporation, so long as any of the 6% Convertible Preferred Stock is outstanding, will not, without the affirmative vote or written consent of the holders of two-thirds of the 6% Convertible Preferred Stock outstanding, issue any other class of stock on a parity with or having priority over the 6% Convertible Preferred Stock or alter materially any provision of this Certificate of Incorporation, or of the By-Laws of the Corporation, with respect to the 6% Convertible Preferred Stock.

"(u) The holders of the 6% Convertible Preferred Stock present thereat in person or by proxy, voting as a class, shall be entitled to elect two Directors of the Corporation at each annual meeting of the Corporation.

"(v) The holders of the 6% Convertible Preferred Stock shall have the following conversion rights:

"(1) Each holder of 6% Convertible Preferred Stock may at his option at any time prior to five days before the date fixed for redemption thereof, upon payment to the Corporation of $3.75 per share of Common Stock into which such share is convertible, convert any or all of his shares of such stock into fully paid and non-assessable shares of the present Common Stock, but without adjustment for dividends in respect of either such shares or the Common Stock into which they are converted, in such ratio (subject to adjustment as hereinafter provided) of shares of the present Common Stock to shares of 6% Convertible Preferred Stock surrendered for conversion as shall be determined by resolution of the Board of Directors, upon the surrender in transferable form to the Corporation of the certificate or certificates of 6% Convertible Preferred Stock so to be converted, accompanied by written notice to the Corporation of the election of the holder to make such conversion of the certificate or certificates for 6% Convertible Preferred Stock so to be converted and the payment of any amounts, including taxes, payable upon such conversion.

"(2) The deposit above provided of any 6% Convertible Preferred Stock and accompanying notice and payment shall be deemed sufficient for all purposes to constitute a conversion of said 6% Convertible Preferred Stock and the holder of record thereof shall be deemed to have become a holder of record of the number of shares of Common Stock to which he shall be entitled upon such conversion and to have ceased to be a holder of record of 6% Convertible Preferred Stock as of the date upon which he shall have deposited such 6% Convertible Preferred Stock and accompanying notice and payment, subject to any applicable provision of law regulating the right to vote and subject to the right of

the Board of Directors at any time in its discretion to fix a period or periods not exceeding an aggregate of eight weeks in any calendar year and not exceeding twenty days at any one time during which the books of the Corporation shall be closed and during which hold-
[fol. 501] ers of record of 6% Convertible Preferred Stock who convert such stock as aforesaid shall, nevertheless, not be deemed to have become holders of record of Common Stock or to have ceased to be holders of record of 6% Convertible Preferred Stock.

"(3) If at any time, or from time to time, the Corporation shall change the outstanding shares of the present Common Stock into the same or a different number of shares of Common Stock, or if such Common Stock is reclassified, exchanged or otherwise changed into a different number of shares of stock with or without par value, of the same or any other class or classes (hereinafter called 'New Stock'), thereafter the 6% Convertible Preferred Stock then outstanding shall be convertible into the New Stock on a basis which shall be the equivalent of the basis of conversion which would have existed if the outstanding shares of the present Common Stock had not been so reclassified, exchanged or otherwise changed.

"(4) If at any time, or from time to time, the Corporation shall declare and pay on or in respect of the present Common Stock, or on or in respect of any New Stock into which the present Common Stock shall have been changed as herein provided, any dividend or dividends in shares of stock of any class now authorized or hereafter created, each holder of 6% Convertible Preferred Stock then outstanding upon conversion thereof shall be entitled to receive the shares of Common Stock or New Stock to which he shall become entitled on such conversion, as hereinabove provided, and in addition a number of shares of the class or classes of stock in which any such dividend or dividends were paid equal to such stock dividend or dividends paid on or in respect of the same amount of Common Stock or New Stock, as the case may be.

"(5) The Corporation shall not issue fractions of

shares of the Common Stock upon conversion of the 6% Convertible Preferred Stock and in lieu thereof the Corporation shall, after aggregating the total number of shares being converted by a holder at any one time, make payment for such fractional share in cash in an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the Corporation's Common Stock, on the effective date of such conversion (or if no sale took place on such date then by the closing price on the last preceding day on which a sale was made) over $3.75."

The rights of holders of the 6% Preferred Stock and the Series A Preferred Stock will be similar in many respects, but there will be substantial points of distinction as mentioned hereafter. The following statements do not purport to be a complete statement of all rights of the holders of 6% Preferred Stock or of Series A Preferred Stock, nor do such statements necessarily give full effect to provisions of statutory or common law. These statements are subject in all respects to the provisions, of the Certificate of Incorporation, as amended and the following statements are qualified in their entirety by the foregoing.

Seniority and Par Value

The 6% Preferred Stock is senior to the Series A Preferred Stock, and to the shares of authorized but unissued Preferred Stock of which class the Series A Preferred Stock is a series. The 6% Preferred Stock is of the par value of $10 per share, whereas the Series A Preferred Stock is of the par value of $100 per share. Accordingly, for the purposes of this comparison, it must be remembered that the Exchange Offer is on the basis of 10 shares of 6% Preferred Stock in exchange for each share of Series A Preferred Stock.

Dividend Rights

The Series A Preferred Stock is entitled to cumulative dividends at the rate of 5½% per annum on the par value thereof ($100) in preference to Common Stock, whereas the 6% Preferred Stock is entitled to cumulative dividends

at the rate of 6% per annum on the par value thereof ($10) in preference to both the Common Stock and the Series A Preferred Stock. Dividends on the 6% Preferred Stock do not commence to accrue until May 1, 1955 and shall be cumulative from such date. The first of such accrued dividends will be payable October 1, 1955. The redemption value used in the conversion formula set forth below takes into account [fol. 502] the fact that dividends on the 6% Preferred Stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor.

Rights on Liquidation, Dissolution or Redemption

Regarding 10 shares of the 6% Preferred Stock as the equivalent of 1 share of the Series A Preferred Stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6% Preferred Stock before any payment is made to the holders of the Series A Preferred Stock. However, because the dividend arrearages on the Series A Preferred Stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of one share of Series A Preferred Stock on May 1, 1955 will be $237, whereas the cash redemption value of 10 shares of 6% Preferred Stock on that date would aggregate $105, the difference representing the accumulated and unpaid dividends aggregating $132 as of that date with respect to each share of Series A Preferred Stock.

The holders of the 6% Preferred Stock upon the voluntary liquidation or dissolution of the Corporation, or upon redemption, are entitled to receive, before any payment shall be made to the holders of the Preferred Stock or the Common Stock, $10.50 per share of such stock, plus all dividends accumulated and unpaid thereon, whether or not earned or declared. The holders of such stock, upon the involuntary liquidation or dissolution of the Corporation, are entitled to receive $10 per share, plus all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of Series A Preferred Stock is in each instance re-

ferred to in this paragraph entitled to an amount (exclusive of dividend arrearages) equal to ten times the equivalent amount set forth with respect to each share of 6% Preferred Stock.

There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the Corporation is by the express terms of its Certificate of Incorporation precluded from redeeming any shares of the 6% Preferred Stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of the Series A Preferred Stock.

Preemptive Rights

Neither class of stock is entitled to preemptive rights.

Sinking Fund

The Series A Preferred Stock is entitled to the benefits of a sinking fund, the provisions with respect to which are not operative at the present time because of accumulated dividends in arrears on the Series A Preferred Stock. There is no provision for a sinking fund with respect to the 6% Preferred Stock.

Voting Rights

In case of default in the payment of four quarterly instalments of dividends on Series A Preferred Stock, or the elapsing of twenty-four consecutive months during which the Corporation shall at no time have fully paid up all dividends due on such stock, such stock is entitled to elect two directors of the Corporation. Series A Preferred Stock is at the present time so entitled to elect directors. Accordingly, the holders of the Series A Preferred Stock, including Messrs. Young, Kirby and Van Pelt (whose holdings of Series A Preferred Stock are listed on page 21 hereof), to the extent that they do not exchange all of their shares of Series A Preferred Stock, will retain this contingent right to elect two directors until such shares are redeemed or retired. The holders of the 6% Preferred Stock, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid.

Conversion Rights

The Series A Preferred Stock is not convertible. The 6% Preferred Stock is convertible into Common Stock at a rate which has been fixed by the Board of Directors in accordance [fol. 503] with the following conversion formula. Such formula provides that the holder of each share of the 6% Preferred Stock, at any time prior to five days before its redemption, will, upon payment to the Corporation of $3.75 per share of Common Stock into which such share is convertible, be entitled to convert such share of 6% Preferred Stock into such number of fully paid and non-assessable shares of Common Stock of the Corporation as shall be arrived at by dividing (1) 23.7 (being 1/10 of the May 1, 1955 redemption price of Series A Preferred Stock) by (2) the difference between $3.75 and an amount equal to the closing price of the Corporation's Common Stock on the New York Stock Exchange on the Closing Date of the Exchange Offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6% Preferred Stock be convertible into more than 10.8 shares of Common Stock of the Corporation. At the time of original issuance of the 6% Preferred Stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of Common Stock into which each share of 6% Preferred Stock is convertible upon payment of $3.75 per share of Common Stock. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any share or shares of 6% Preferred Stock. If the aggregate number of shares of 6% Preferred Stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of Common Stock, the number of shares of Common Stock issuable upon such conversion shall equal such whole number, and an amount equal to (1) such fraction multiplied by (2) the excess of the closing price on the New York Stock Exchange of the Corporation's Common Stock on the effective date of such conversion (or if no sale took

place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 shall be paid in cash by the Corporation to such holder. In the event of any reclassification, exchange or other change of the Common Stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of Common Stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of 6% Preferred Stock will be adjusted accordingly. Assuming that the closing price of the Common Stock on the Closing Date of the Exchange Offer is $8.375, the number of shares of Common Stock into which one share of said 6% Preferred Stock would be convertible would be 5.1 shares and the aggregate conversion payment in connection therewith, at the rate of $3.75 per share, would be $18.75. Assuming that the holder if one share of 6% Preferred Stock exercised his conversion privilege, the Corporation would have paid him $0.46 in lieu of issuing scrip for his remaining fractional interest. Based upon the same price assumption, the aggregate market value of the five full shares of Common Stock obtained upon conversion would have been $41.88 which, less the net aggregate conversion payment of $18.29 ($18.75 less $0.46) would have represented an approximate market value of $23.59.

Should the market price of the Common Stock on the Closing Date of the Exchange Offer be less than approximately $6 per share, the conversion privilege measured by the market value of the shares of Common Stock into which each share of 6% Preferred Stock is convertible will not as of that date, because of the 10.8 share maximum limitation stated above, fully compensate the holders of Series A Preferred Stock who exchange their shares. Such approximate market values do not reflect any possible adverse effect on the market prices because of dilusion of the asset value of shares of Common Stock as a result of conversions of 6% Preferred Stock, as to which page 15 hereof should be consulted.

Extending the assumptions made above with respect to one share of said 6% Preferred Stock to 1,367,440 shares of 6% Preferred Stock, which number of shares would be out-

standing if the holders of all outstanding shares of Series A Preferred Stock accept the Exchange Offer, and making such computations first on the basis of the closing price of the Common Stock on the Closing Date being $6 per share, approximately 14,358,120 additional shares of Common Stock will be required in connection with such conversions, and 465,153 shares will remain authorized, unissued and available for issuance for such purposes and for such considerations as are deemed appropriate by the Board of Directors. However, making such computations on the basis of the closing price of the Common Stock on the Clos- [fol. 504] ing Date being $8.375 per share, 6,973,944 additional shares would be required in connection with such conversions and 7,849,329 shares would remain authorized and unissued.

The following table reflects the results of the application of the conversion formula to a range of assumed market prices of Common Stock and sets forth the resulting conversion rate of the 6% Preferred Stock in each such case.

6% PREFERRED STOCK CONVERSION TABLE

Common Stock Market Price Per Share	No. of Shares of Common Stock into which each share of 6% Preferred Stock will be convertible	Common Stock Market Price Per Share	No. of Shares of Common Stock into which each share of 6% Preferred Stock will be convertible
5⅞ and below	10.8	9	4.5
6	10.5	9⅛	4.4
6⅛	10.0	9¼	4.3
6¼	9.5	9⅜	4.2
6⅜	9.0	9½	4.1
6½	8.6	9⅝	4.0
6⅝	8.2	9¾	4.0
6¾	7.9	9⅞	3.9
6⅞	7.6	10	3.8
7	7.3	10⅛	3.7
7⅛	7.0	10¼	3.6
7¼	6.8	10⅜	3.6
7⅜	6.5	10½	3.5
7½	6.3	10⅝	3.4
7⅝	6.1	10¾	3.4
7¾	5.9	10⅞	3.3
7⅞	5.7	11	3.3
8	5.6	11⅛	3.2
8⅛	5.4	11¼	3.2
8¼	5.3	11⅜	3.1
8⅜	5.1	11½	3.1
8½	5.0	11⅝	3.0
8⅝	4.9	11¾	3.0
8¾	4.7	11⅞	2.9
8⅞	4.6	12	2.9

Miscellaneous Provisions

The affirmative approval of the holders of a majority of the outstanding shares of Series A Preferred Stock is required before the Corporation may issue any additional shares of such stock or of any other class of stock on a parity with or having priority over such stock. The issuance of any shares on a parity with or prior to shares of 6% Preferred Stock or the making of any material change in the Certificate of Incorporation, or the By-Laws of the Corporation, with respect to the 6% Preferred Stock requires the affirmative approval of the holders of two-thirds of the outstanding shares of 6% Preferred Stock.

Listing on New York Stock Exchange

The Series A Preferred Stock and the Common Stock are listed on the New York Stock Exchange. The Corporation is making application for the listing on the New York Stock Exchange of the 6% Preferred Stock and of the shares of Common Stock into which such 6% Preferred Stock may be converted, each upon official notice of issuance thereof.

Transfer Agent and Registrar

J. P. Morgan & Co. Incorporated, 23 Wall Street, New York 8, New York, has been named as Transfer Agent for the 6% Preferred Stock and Colonial Trust Company, 90 Wall Street, New York 5, New York, has been named as the Registrar of such Stock.

[fol. 505] Description of Common Stock

There are authorized 22,000,000 shares of Common Stock having a par value of $1.00 per share. As of January 31, 1955, 4,641,585 shares were issued and outstanding in the hands of the public, there being approximately 15,120 holders thereof.

Each holder of Common Stock is entitled to one vote for each share of such Stock on matters upon which such stock is entitled to vote including the election of directors when in order. At present the By-Laws provide that four directors are to be elected by the holders of the Common Stock. The holders of the 6% Preferred Stock, voting as a class, are,

however, entitled to elect two additional directors of the Corporation at each annual meeting, as are the holders of the $4 Prior Preferred Stock, and the holders of the Series A Preferred Stock are now also entitled to elect two directors by reason of the existing default in the payment of dividends on such Stock. There is no provision for cumulative voting of Common Stock. Upon any liquidation or dissolution of the Corporation, the holders of Common Stock are entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the Corporation's classes of preference shares.

Article Ninth of the Corporation's Certificate of Incorporation provides that the holders of Common Stock are entitled to purchase ratably according to their respective holdings any shares of Common Stock (voting or non-voting) of the Corporation issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such Common Stock for cash, in either case upon appropriate terms, but with certain specified exceptions, one of which includes any shares of Common Stock issued upon conversion of preferred stock convertible into Common Stock. Consequently, the shares of Common Stock proposed to be issued and sold upon conversion of the 6% Preferred Stock would not be subject to preemptive rights.

The $3.75 which the Corporation will receive for each share of Common Stock issued upon conversion of the 6% Preferred Stock will be used by the Corporation for its general corporate purposes.

As of January 31, 1955, there were issued and outstanding Common Stock Subscription Warrants of the Corporation in bearer form entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued Common Stock of the Corporation at a price of $3.75 per share, and shares of such stock have been reserved for this purpose. Such Warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the Corporation and no dividend or interest is payable or accrues with respect thereto or to the shares of Common Stock which may be subscribed for and purchased there-

The outstanding number of shares of each class of voting securities of Alleghany Corporation as of January 31, 1955 was as follows: 28,845 shares of $4 Prior Preferred Convertible Stock; 136,744 shares of Series A Preferred Stock, and 4,637,797 shares of Common Stock.

As of January 31, 1955, Mr. Allan P. Kirby, the President and a director of the Corporation, was the beneficial owner of $631,700 principal amount of 5% Sinking Fund Debentures, Series A, due November 1, 1962, of the Corporation or 8.4% of the Corporation's total outstanding; 12,959 shares, or 9.5% of the Series A Preferred Stock of the Corporation; 516,500 shares, or 11.1%, of the Common Stock of the Corporation. As of January 31, 1955, a personal holding company in which Mr. Kirby has an interest, owned 200 shares of Series A Preferred Stock. Mr. Kirby is President of a charitable corporation, in which he has no financial interest, which owned, on January 31, 1955, 1,162 shares of Series A Preferred Stock, and 6,700 shares of Common Stock of the Corporation.

As of January 31, 1955, Mr. Robert R. Young, Chairman of the Board of the Corporation, was the beneficial owner of 2,500 shares, or 9.7%, of the $4 Prior Preferred Convertible Stock of the Corporation; 11,087 shares, or 8.1%, [fol. 515] of the Series A Preferred Stock, of the Corporation; 30,000 shares, or 0.7%, of the Common Stock of the Corporation; and Options to purchase 100,000 shares of the Common Stock of the Corporation at a price of $3.0625 per share. As of January 31, 1955, Anita O'Keeffe Young, wife of Mr. Robert R. Young, was the beneficial owner of 12,650 shares, or 48.9%, of $4 Prior Preferred Convertible Stock; 3,738 shares, or 2.7%, of Series A Preferred Stock; and Alleghany Corporation Warrants evidencing the right to purchase an aggregate of 7,100 shares of Common Stock of the Corporation.

Mr. and Mrs. Robert R. Young, Mr. Allan P. Kirby and Mr. Andrew Van Pelt have informed the Corporation that they presently intend, if substantially all shares of Series A Preferred Stock are tendered in exchange for 6% Preferred Stock of the Corporation, to tender all of their holdings of Series A Preferred Stock in exchange therefor. If the Exchange Offer is consummated on a basis of less than sub-

under until and unless, and except to the extent that, such Warrants are exercised. Such Warrants are listed on the American Stock Exchange.

Effects of Exchange Offer

In the opinion of the management of the Corporation, the Exchange Offer of ten shares of 6% Preferred Stock for each share of Series A Preferred Stock is in the best interests of the Corporation and of the holders of all three of its present outstanding classes of stock. No dividends were paid by the Corporation on any class of its stock from May 1, 1931 through the year 1949, nor were any dividends paid on any class of its stock in 1953. Dividends were paid by the Corporation on the Prior Preferred Convertible Stock in the years 1950, 1951 and 1952 in the respective amounts of $2.50, $5 and $10 per share. Dividends were paid by the Corporation on the $4 Prior Preferred Stock in 1954 in the amount of $4 per share. The aggregate cash dividends declared and paid by the Corporation in the years 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470 and $103,380, respectively. Assuming that the Exchange Offer is completed on a maximum basis (136,744 shares of Series A Preferred Stock being exchanged), and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 Prior Preferred Stock and 1,367,440 shares of 6% Preferred Stock, the aggregate dividend requirements for each class of said stock would be $103,380 and $820,464, respectively. The payment of dividends is, of course, dependent upon [fol. 506] the earnings and financial condition of the Corporation. As will be noted from the table set forth on page 17 hereof, neither the dividend requirements of the Series A Preferred Stock nor of the 6% Preferred Stock were earned from portfolio income in either 1953 or 1954. Payment of dividends on any of the classes of preferred stock of the Corporation during 1955 and successive years will be dependent upon a material improvement in net portfolio income or the availability of profits from security transactions.

If all of the shares of Series A Preferred Stock are exchanged, the present dividend arrearages with respect to the Series A Preferred Stock will be removed. Inasmuch as there is no dividend arrearage on the $4 Prior Preferred

Stock, and dividends are currently being paid thereon, the new 6% Preferred Stock would be entitled to receive dividends on a current basis and the Corporation would not be prevented solely by a dividend arrearage on senior stock from paying dividends to the holders of its Common Stock. The aggregate amount of dividend accumulations on the Series A Preferred Stock as of January 31, 1955 was $17,862,185, or $130.625 per share.

The consummation of the Exchange Offer will result in substantial changes in the rights of the holders of the Series A Preferred Stock who exchange their stock. Such changes are discussed elsewhere herein, principally under the heading "Description of 6% Preferred Stock and Comparison With Series A Preferred Stock."

By virtue of the conversion rights of the 6% Preferred Stock, it is expected that the persons exchanging Series A Preferred Stock will be afforded an opportunity to participate in the progress of the Corporation, as reflected in the market value of its Common Stock. The existence of such conversion rights will not have any immediate effect on the Common Stock but the exercise of such conversion rights will at that time have the effect of diluting the rights of Common stockholders, as such rights then exist. In this connection, the table at the bottom of page 14 hereof and the information on page 15 hereof should be consulted.

If all of the outstanding shares of Series A Preferred Stock are surrendered for exchange pursuant to the Exchange Offer, all dividend arrearages on senior classes of stock would be wiped out and the Corporation would be legally entitled to begin the payment of dividends on Common Stock. If less than all of the outstanding shares of Series A Preferred Stock are surrendered for exchange, the Corporation would not be legally entitled to begin the payment of dividends on Common Stock until the remaining shares of Series A Preferred Stock were redeemed or full payment made of the cumulative dividend arrearages thereon.

Because of the uncertainty as to the number of shares of Series A Preferred Stock which may be surrendered for exchange, the Board of Directors is not prepared presently to decide whether it will call for redemption the shares of

outstanding Series A Preferred Stock which shall not have been exchanged under the Exchange Offer, or to what extent, except as hereafter stated, it will pay dividends on account of arrearages on the shares of Series A Preferred Stock then outstanding. Nevertheless, if the approval of the Interstate Commerce Commission is obtained and the Exchange Offer is consummated, the Board of Directors of the Corporation presently intends thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of Series A Preferred Stock at the rate of $5.50 per share per annum.

To the extent that shares of Series A Preferred Stock might ultimately be redeemed rather than exchanged, or dividend arrearages thereon might ultimately be paid in cash, the assets of the Corporation would be reduced by the amount of cash expended, and, as a consequence, the income of the Corporation might reasonably be expected to be reduced accordingly. It should be noted that the aggregate accrued dividends on all presently outstanding shares of Series A Preferred Stock on May 1, 1955, would be $18,050,208 and if it were assumed that payment of such accrued dividends was to be made on that date, such payment would require the liquidation of a substantial part of the Corporation's portfolio of investments with a resulting loss in earning power.

The effect on the present Common Stock of the exercise of the conversion rights of the 6% Preferred Stock is substantial and should be noted. Assuming that the Exchange [fol. 507] Offer is completed and that the 136,744 presently outstanding shares of Series A Preferred Stock are exchanged and ultimately converted into shares of Common Stock, there would be required to be issued, applying the conversion formula mentioned above on the basis of the closing price of the Common Stock on the Closing Date being $6 per share, 14,358,120 shares of Common Stock, and applying it on the basis of the closing price of the Common Stock on the Closing Date being $8.375 per share, 6,973,944 shares of Common Stock. Therefore, the shares of Common Stock ultimately issuable to the present holders of the Series A Preferred Stock will represent, on the first of the foregoing assumptions, approximately 75.6%, and on the

second of the foregoing assumptions, approximately 60.1%, of all shares of Common Stock outstanding upon giving effect to such conversions. However, it should also be noted that in connection with the exercise of such conversion rights of the 6% Preferred Stock, and on the basis of the first of the foregoing assumptions, the Corporation will receive an aggegregate of $53,842,950 and on the second of the foregoing assumptions an aggregate of $26,152,290, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion), which cash will be available for working capital and investment. For the possible diluting effect of the issuance of such shares of Common Stock under the proposed conversion formula, the information set forth on page 15 hereof should be consulted.

Attached hereto are financial statements of the Corporation, which include a Balance Sheet of the Corporation as of November 30, 1954, in which investments are carried at indicated market quotations as of that date (except for certain unlisted securities and joint venture investments which are carried at cost). Set forth in the tables below, under the heading "Actual" are the amounts (with respect to Table I based on such Balance Sheet and with respect to Table II based on computations prepared by the Corporation in similar manner as of January 31, 1955) of the net assets (total and per share) applicable to $4 Prior Preferred Stock, 6% Preferred Stock, Series A Preferred Stock and Common Stock (after deducting in each case the aggregate involuntary liquidation value, including any accumulated and unpaid dividends, of all classes of stock senior to the class in question). Also set forth in the tables below under the heading "Extent of Exchanges Assumed" are the approximate amounts of similar net assets on a pro forma basis, derived by applying to such figures the effect of exchanges assumed to the extent indicated. In making these computations, it has been assumed that each aggregate $100 par value of 6% Preferred Stock (par value $10 per share) was issued (ten shares for one share) in exchange for $100 par value of Series A Preferred Stock.

TABLE I (As of November 30, 1954)

	Actual		Extent of Exchanges Assumed: Assuming Exchange of 136,744 shares		Assuming Exchange of 100,000 shares	
	Total	Per Share	Total	Per Share	Total	Per Share
Applicable Net Assets:						
$4 Prior Preferred	$59,025,005	$2,283.81	$59,025,005	$2,283.81	$59,025,005	$2,283.81
6% Preferred	——	——	56,940,175	41.64	56,940,175	56.94
Series A Preferred	56,940,175	416.40	——	——	46,940,175	1,277.49
Common	25,528,939	5.50	43,265,775	9.33	38,499,772	8.30

TABLE II (As of January 31, 1955)

Applicable Net Assets:						
$4 Prior Preferred	$63,797,157	$2,489.45	$63,797,157	$2,489.45	$63,797,157	$2,489.45
6% Preferred	——	——	61,712,828	45.13	61,712,828	61.71
Series A Preferred	61,712,828	451.30	——	——	51,712,828	1,407.38
Common	30,176,243	6.50	48,038,428	10.35	43,238,743	9.32

Based upon the assumptions above stated, the foregoing tabulation indicates a range of possible effects of carrying out the exchange of 6% Preferred Stock for Series A Preferred Stock.

[fol. 508] Effect of Various Assumed Rates of Conversion of 6% Preferred Stock Into Common Stock

Set forth in the table below are the net asset values per share of the Corporation's Common Stock after giving effect to the assumed rates of conversion, and conversions, indicated.

Assumed Net Asset Value of Common After Consummation of Exchange Offer	Net Asset Value per Share of Common Stock after Assumed Conversions at Indicated Rates			
	Converting at 10.5 for 1 (1)		Converting at 5.1 for 1 (2)	
	1,000,000 shs. of 6% Pfd.	1,367,440 shs. of 6% Pfd.	1,000,000 shs. of 6% Pfd.	1,367,440 shs. of 6% Pfd.
$ 3	$4.18	$4.29	$4.42	$4.63
4	4.49	4.53	4.90	5.03
5	4.79	4.78	5.37	5.43
6	5.10	5.02	5.85	5.83
7	5.41	5.26	6.32	6.23
8	5.71	5.51	6.80	6.63
9	6.02	5.75	7.28	7.02
10	6.33	6.00	7.75	7.42
11	6.63	6.24	8.23	7.82
12	6.94	6.48	8.71	8.22

(1) Conversion rate based on sale price of $6 per share.
(2) Conversion rate based on sale price of $8⅛ per share.

Net Asset Value Per Share of Common Stock As Affected By Exchange Of Series A Preferred Stock For 6% Preferred Stock And Conversion Of 6% Preferred Stock Into Common Stock

The above table should be studied together with the tables appearing at the bottom of page 14 hereof so that the immediate effects of exchange and the ultimate effects of conversion can be noted.

In brief, the tables appearing at the bottom of page 14 indicate that the short-term effect of the exchange of Series A Preferred Stock for 6% Preferred Stock will result in a substantial increase in the net asset value per share of Common Stock by reason of the elimination of arrearages on the Series A Preferred Stock. The 6% Preferred Stock is not redeemable by the Corporation until May 1, 1970, thereby precluding forced conversion for this period. Consequently, it is expected that at least until dividends are paid on the Common Stock, a substantial part of the 6% Preferred Stock will remain unconverted and outstanding. However, to the extent that the 6% Preferred Stock is con-

verted into Common Stock, such conversions will tend to reduce the net asset value of the Common Stock if the net asset value at such time exceeds approximately $4.50 per share. The estimated effect of such conversions on the net asset value of the Common Stock is indicated in the above table.

[fol. 509] Information With Respect to Series A Preferred Stock

The par value and the redemption and liquidation values of the Series A Preferred Stock as of January 31, 1955 were as follows:

Series A Preferred Stock

Par value	$100
Redemption Value	235⅝ (a)
Voluntary Liquidation Value	235⅝ (a)
Involuntary Liquidation Value	230⅝ (a)

(a) Includes unpaid dividends of $1.30⅝ per share.

The number of holders and the number of Series A Preferred Stock authorized, issued and outstanding in the hands of the public and held in the Treasury as of January 31, 1955 were as follows:

Series A Preferred Stock

Number of Holders (approximate)	1,186
Number of Shares Authorized	1,195,000
Number of Shares Issued	144,544
Number of Shares Outstanding in Hands of Public	136,744
Number of Shares Held in the Treasury	7,800

Opinion of Counsel

White & Case, 14 Wall Street, New York 5, New York, counsel for the Corporation, are passing upon the validity of the 6% Preferred Stock and of the authorized but unissued Common Stock issuable upon conversion of the 6% Preferred Stock.

Federal Income Tax Consequences To Stockholders As A Result Of Exchange Offer

The Corporation has been advised by White & Case, counsel for the Corporation, that in their opinion stockholders who exchange their shares of Series A Preferred Stock for shares of 6% Preferred Stock will not thereby realize any gain or loss for Federal income tax purposes; that stockholders who retain their shares of Series A Preferred Stock will realize ordinary income for Federal income tax purposes on any dividends received, whether such dividends are current dividends or on account of cumulative dividend arrearages, except that they will realize capital gain or loss with respect to any amounts received on the redemption of such stock if such stock is ultimately redeemed.

[fol. 510]

Certain Information Concerning Alleghany Corporation

There are attached hereto Balance Sheets of the Corporation as of December 31, 1953 and November 30, 1954, and related Statements of Income and Surplus (deficit) for the three years and eleven months ended November 30, 1954, together with the report of Peat, Marwick, Mitchell & Co., independent public accountants for the Corporation, with respect to the financial statements at December 31, 1953 and the three years then ended.

There is also attached hereto a schedule of investments showing both cost and market quotations as of November 30, 1954, including jointly held securities in joint ventures as of November 30, 1954, which has been prepared by the Corporation and is subject to audit by independent accountants.

The following is a summary of earnings of the Corporation for the periods indicated, which summary is for the years 1934-53 and for the eleven months ended November 30, 1954, inclusive, based on financial statements contained in Annual Reports and in the interim reports attached hereto but adjusted by the Corporation to effect uniformity of accounting to reflect, in the years to which they apply, items recorded in later years:

	Gross Income	Net Income or *Loss* exclusive of security transactions before provision for Federal taxes on Income	Federal taxes on Income	Net Income or *Loss* exclusive of security transactions	Profits or *Losses* From Sales of Investment Securities	Profits or *Losses* From Transactions in Own Bonds
1934	$ 3,364,675	*$(1,108,665)*	—	*$(1,108,665)*	$ 689	—
1935	3,975,063	*(509,392)*	—	*(509,392)*	1,007	—
1936	3,923,323	*(482,388)*	—	*(482,388)*	3,494	—
1937[1]	12,805,912	8,180,012	—	8,180,012	786	—
1938	2,428,129	*(2,136,460)*	$375,000	*(2,511,460)*	*(29,609,281)*	$ 764,171
1939	3,622,492	*(1,102,951)*	—	*(1,102,951)*	*(20,383,751)*	336,801
1940	6,057,134	1,635,837	53,242	1,582,595	5,315	331,815
1941	6,290,828	1,988,231	91,500	1,896,731	6,816	994,658
1942	6,560,643	2,375,577	134,940	2,240,637	*(426,177)*	581,569
1943	6,619,624	3,092,814	188,350	2,904,464	453,119	*(553,004)*
1944	4,745,579	2,048,786	252,651	1,796,135	4,853,226	*(1,677,617)*
1945	2,565,106	1,471,269	95,375	1,375,894	*(2,572,231)*	*(232,725)*
1946	2,570,929	1,703,776	110,000	1,593,776	2,007,597	—
1947	2,628,686	1,856,132	110,000	1,746,132	*(13,747,895)*	—
1948	5,439,055	4,634,609	598,000	4,036,609	*(6,235,210)*	—
1949	2,887,356	1,982,558	113,000	1,869,558	*(5,583,016)*[2]	—
1950	2,189,613	1,334,408	90,000	1,244,408	2,175,997[2]	—
1951	2,117,017	995,378	75,000	920,378	*(605,037)*	—
1952	2,384,525	931,652	70,000	861,652	50,806	—
1953	2,020,715	264,222	20,000	244,222	6,452,830	—
1954 (11 mos.)	[3]1,666,967	169,593	8,000	161,593	1,357,640[4]	—

Parentheses and italics denote red figures.

(1) Includes $8,629,605, representing cost to Chesapeake Corporation of 255,600 shares Chesapeake and Ohio Railway Company common stock received as an extra dividend November 30, 1937 on 1,278,000 shares of common capital stock of The Chesapeake Corporation, a company then controlled by Alleghany Corporation.

(2) Includes $51,272 net loss on exchanges of investment securities for Alleghany Corporation preferred stocks.

(3) Not audited by independent accountants.

(4) Includes loss of $418,320 on sale of 104,854 shares of The Chesapeake and Ohio Railway Company common stock, of which 93,600 shares were acquired, in the 1938–1942 liquidation of The Chesapeake Corporation, on the 1929–1930 cost basis of The Chesapeake Corporation common stock.

[fol. 511] Based on the above figures under the heading "Net Income or *Loss* Exclusive of Security Transactions", the net income or *loss* per share of the several classes of stock of the Corporation for the years 1934-53 and for the eleven months ended November 30, 1954 has been as follows:

	Series A Preferred[1]			Common		
Year	Low	High	Number of Shares Sold	Low	High	Number of Shares Sold
1934	4 3/8	16 1/8	213,600	1 1/4	5 1/4	797,600
1935	2 3/8	14 5/8	162,400	3/4	3 3/8	747,800
1936	12 3/8	61 1/2	616,500	2 1/2	5 1/2	1,963,700
1937	11	59 3/4	238,700	1	5 3/8	1,440,700
1938	6 1/4	17 7/8	353,800	7/8	1 5/8	407,600
1939	5 3/4	20 1/2	410,800	5/8	2	372,700
1940	5 3/4	14 5/8	279,600	3/8	1 1/8	236,200
1941	3 5/8	10 5/8	147,600	1/8	5/8	229,800
1942	3 1/2	6 3/8	148,200	3/16	1/2	149,600
1943	5 1/8	32 1/4	1,148,900	5/16	3 1/4	1,852,600
1944	23 1/2	38	936,900	2	3 1/4	1,235,600
1945	34 5/8	60 3/4	873,700	2 5/8	6 1/8	2,793,600
1946	29 3/4	69 1/4	499,700	3 3/8	8 1/4	2,506,300
1947	25 1/4	44	319,900	2 3/4	5 3/4	1,067,400
1948	37	58 1/2	251,200	2 1/2	4 3/8	1,107,800
1949	40 1/2	82 1/2	169,500	2 1/8	4	981,200
1950	58	86 3/4	91,500	2 5/8	5 1/8	1,780,900
1951	73 1/2	87 3/8	46,900	3	4 7/8	1,452,700
1952	79 3/8	158 1/4	80,500	2 3/4	5 3/8	1,503,100
1953	130	152	20,200	3	5 3/8	1,182,200
1954	140	210	26,000	3 1/4	9	2,599,300

[1] With respect to periods prior to February 1, 1944, the figures given relate to Series A Preferred Stock with warrants (expiring on February 1, 1944) attached for the purchase of Common Stock at $30 per share.

[fol. 512] The Corporation's Series A Preferred Stock and the Common Stock are listed on the New York Stock Exchange. The high and low sales prices for periods commencing with the year 1934 and the number of shares sold on the New York Stock Exchange during such periods, as reported in The Commercial & Financial Chronicle, were as follows:

	Net Income per Share of Stock		
Year	Prior Preferred Convertible[1]	Series A Preferred[2]	Common[3]
1934	—	*$(1.66)*	*$(1.15)*
1935	*$(3.87)*	*(1.26)*	*(1.05)*
1936	*(3.89)*	*(1.19)*	*(1.01)*
1937	72.37	11.83	0.94
1938	*(22.50)*	*(4.18)*	*(1.43)*
1939	*(9.88)*	*(2.07)*	*(1.12)*
1940	14.17	1.95	*(0.52)*
1941	16.99	2.42	*(0.45)*
1942	20.07	2.94	*(0.38)*
1943	26.02	3.93	*(0.23)*
1944	16.09	2.27	*(0.48)*
1945	12.32	1.64	*(0.57)*
1946	16.03	2.16	*(0.45)*
1947	23.60	2.83	*(0.32)*
1948	70.96	8.95	0.33
1949	50.29	5.85	0.02
1950	34.80	4.72	*(0.04)*
1951	28.53	3.54	*(0.10)*
1952	30.43	5.38	*(0.09)*
1953	7.08	1.03	*(0.08)*
1954 (11 months)	6.25	0.43	*(0.14)*

Parentheses and italics denote red figures.

(1) The Prior Preferred Convertible Stock was redeemed on October 1, 1953. Consequently the 1953 amount is a 9-month figure and the 1954 figure refers to the $4 Prior Preferred Convertible Stock which was issued in 1953 in exchange for Prior Preferred Convertible Stock.

(2) After deducting the amount of current dividend requirements for Prior Preferred Stock through September 30, 1953 although not paid, and thereafter the amount of dividends on the $4 Prior Preferred Stock which were paid. The annual dividend requirement for each share of Series A Preferred Stock is $5.50.

(3) After deducting the amount of current dividend requirements for Prior Preferred Stock through September 30, 1953 and Series A Preferred Stock although not paid, and thereafter the amount of dividends on the $4 Prior Preferred Stock which were paid.

During the period January 1 to January 31, 1955 the low and high sales prices for said Series A Preferred Stock were 209½ low and 228 high per share, respectively, and for said Common Stock were 7¼ low and 9½ high per share, respectively. 11,800 shares of said Series A Preferred Stock and 763,700 shares of said Common Stock were sold on the New York Stock Exchange during January, 1955.

[fol. 513] As of December 31, 1937 to 1953, inclusive, the total net assets and the net assets per share of Series A Preferred Stock and Common Stock, on the basis of financial statements contained in annual reports but adjusted by the Corporation in the same manner as the summary of earnings of the Corporation hereinabove set forth, have been adjusted, and based on indicated market quotations of assets of the Corporation (except certain unlisted securities and joint venture investments which are carried at cost) at such dates, and the similar total net assets and the net assets per share as of December 31, 1954 and January 31, 1955, in each case as estimated by the Corporation, based on market quotations as of such dates, have been as follows:

Year	Total Net Assets	Net Assets per Share: Series A Preferred	Net Assets per Share: Common
1937	*$(1,522,183)*	*$(11.41)*	——
1938	4,293,759	*(3.09)*	——
1939	16,306,298	14.25	——
1940	19,722,387	18.86	——
1941	5,614,108	*(2.74)*	——
1942	12,686,021	7.26	——
1943	40,685,065	48.76	——
1944	49,960,672	62.21	——
1945	65,763,252	85.46	——
1946	55,719,552	76.74	——
1947	50,753,586	80.92	——
1948	42,412,552	86.24	——
1949	32,929,876	97.69	——
1950	37,941,785	142.25	——
1951	37,655,260	147.37	——
1952	41,511,995	265.42	$1.50
1953	34,657,540	238.14	0.40
1954	65,023,758	460.21	6.78
1955 (January 31)	63,797,157	451.30	6.50

Italics within parentheses and dashes denote negative asset values.

[fol. 514] Interest of Management

The following statements concerning the beneficial ownership of securities of Alleghany Corporation held by the Directors are based upon information received from the Directors themselves as to their respective holdings as of January 31, 1955:

Nominee	Principal Occupation	Securities of Alleghany Corporation Beneficially Owned				
		Shares of $4 Prior Preferred Convertible Stock	Shares of Preferred Stock Series A	Shares of Common Stock	Shares of Common Stock Purchasable Under Warrants	Principal Amount of 5% Sinking Fund Debentures
O. Henry Briggs	Management of Personal Affairs	200	—	200	—	—
Thomas J. Deegan, Jr.	Vice President of Alleghany Corporation; Vice President of The New York Central Railroad Company	—	—	100	—	—
Walter W. Foskett	Attorney; Trustee, Chairman and General Counsel of Estate of Sir Henry Oakes, Bt., deceased, Nassau, Bahamas; General Investments	—	—	28,946	—	—
Henry J. Guild	President and Director of Brightwater Paper Company	—	—	100	—	—
Allan P. Kirby	President of Alleghany Corporation; Director of The New York Central Railroad Company; Management of Personal Affairs	—	12,959	516,500	226,340	$631,700
Herman R. Neff	Engineer, President and Director of the Geo. S. Rider Co., Cleveland, Ohio (Professional Services—preparation of plans and specifications for industrial and institutional buildings)	10	—	2,000	—	—
Andrew Van Pelt	Management of Personal Affairs	—	500	1,000	8,500	—
Robert R. Young	Chairman of the Board of Alleghany Corporation; Chairman of the Board of The New York Central Railroad Company	2,500	11,087	30,000 578,846	—	—

stantially all shares of Series A Preferred Stock being tendered, such persons presently intended to tender approximately the same proportion of their holdings, as compared with the total number of such shares then outstanding, as are tendered by all other persons. It should be noted that, as indicated in the table set forth on page 14 hereof, the Common Stock and unexchanged shares of Series A Preferred Stock should benefit substantially in terms of available net assets per share as a result of the proposed exchange.

None of the stockholders whose present intentions are set forth above has entered into any agreement with the Corporation, or is under any other obligation, to exchange shares of Series A Preferred Stock under the Exchange Offer. Furthermore, each of them, in expressing his present intention, has reserved to himself full right to take whatever action under the Exchange Offer he deems desirable in his own interest under all the circumstances which may exist at the time such stockholder may make his final decision.

By order of the Board of Directors.

Alleghany Corporation, By David W. Wallace, Secretary and Treasurer.

February 10, 1955.

[fol. 516] PEAT, MARWICK, MITCHELL & Co.

Certified Public Accountants

Seventy Pine Street

New York 5, N. Y.

The Board of Directors and the Stockholders, Alleghany Corporation.

We have examined the balance sheet of Alleghany Corporation as of December 31, 1953 and the related statements of income, profit and loss on security transactions and surplus (deficit) for the three years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the

accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the accompanying balance sheet and statements of income, profit and loss on security transactions and surplus (deficit), with notes thereto, present fairly the financial position of Alleghany Corporation at December 31, 1953 and the results of its operations for the three years then ended, in conformity with generally accepted accounting principles applied in all material respects on a consistent basis.

Peat, Marwick, Mitchell & Co.

New York, N. Y., December 20, 1954

[fol. 517] ALLEGHANY CORPORATION

Schedule of Investments as of November 30, 1954
(Unaudited)

	Shares or principal amount	*Cost (A)*	*Indicated market quotations (A)*
CORPORATION SECURITIES OTHER THAN MISSOURI PACIFIC RAILROAD COMPANY COMMON STOCK			
Investors Diversified Services, Inc. voting common stock (pledged 107,150 shs.)	400,195 shs.(B)	$ 1,455,381	$27,113,211
Lansall Corporation			
5 year 4½% debentures	$1,000,000	1,000,000	1,000,000(C)
Class A common stock	5,000 shs.	500,000	500,000(C)
Marshall-Wells Company common stock (pledged 885 shs.)	900 shs.	252,649	235,800
Missouri Pacific Railroad Company			
5½% Bonds—due 5/1/49 (pledged)	$ 624,000	636,695	689,520
5% Bonds—due 2/1/[illegible] (pledged)	40,000	46,958	47,800
Gen. Mortg. 4% Bonds due 3/1/75 (pledged $1,587,000)	1,592,000	1,436,542	1,858,660
5% Bonds—due 3/1/77 (pledged)	515,000	603,255	614,781
5% Bonds—due 11/1/78 (pledged)	13,000	15,415	15,730
5% Bonds—due 4/1/80 (pledged)	13,000	15,373	15,746
5% Bonds—due 2/1/81 (pledged)	82,000	96,434	97,990
New York Central Railroad Company common stock (pledged 45,100 shs.)	277,200 shs.(B)	6,625,818	7,033,950
Sara Corporation common stock	150 shs.	150	150(C)
Taylor Oil and Gas Co. common stock (pledged 27,000 shs.)	44,100 shs.	800,000	959,175
		13,484,670	40,182,513

MISSOURI PACIFIC RAILROAD COMPANY				
Common stock—cost	$31,032,312	396,000 shs.(D)		
Less reserve	29,212,007		1,820,305	3,712,500
			15,304,975	43,895,013
INVESTMENT IN JOINT VENTURES (Note 4 of Notes to Financial Statements):				
Delhi Oil Corporation		147,579 shs.	2,035,782	2,213,685
Investors Diversified Services, Inc. Class A (pledged)		20,000 shs.	360,000	1,355,000
Lionel Corporation (pledged 22,000 shs.)		25,600 shs.	619,844	563,200
New York Central Railroad Company (pledged 378,000 shs.)		600,000 shs.	15,000,000	15,225,000
			18,015,626	19,356,885
Less 50% ownership of other participants			9,007,813	9,678,442
Alleghany Corporation 50% ownership of above detailed securities			9,007,813	9,678,443
Notes receivable from other participants (secured by pledge of their 50% ownership of above detailed securities)			9,007,813	9,007,813
Total Alleghany Corporation investment in joint ventures			18,015,626	18,686,256
Total investments			$33,320,601	$62,581,269

(A) See Note 2 of Notes to Financial Statements.
(B) See Note 2 of Notes to Financial Statements.
(C) At cost.
(D) See Note 3 of Notes to Financial Statements.

[fol. 518] BEFORE THE INTERSTATE COMMERCE COMMISSION, DIVISION 4

Finance Docket No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

ORDER DENYING LEAVE TO BRESWICK & CO. TO INTERVENE—February 15, 1955

It appearing, That on September 20, 1954, an application was filed by (1) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (Big Four) and the Louisville & Jeffersonville Bridge and Railroad Company (bridge company) to merge their properties and franchises, (2) the Big Four, as lessor, and The New York Central Railroad Company (Central), as lessee, to modify the provisions of their lease of January 2, 1930, to include the properties of the bridge company, (3) Central and Alleghany Corporation to acquire, in view of the latter's control of Central and Central's control of the Big Four, control of the properties and franchises of the bridge company; and requesting an order of this Commission containing, among other things, a provision that Alleghany Corporation (Alleghany) shall continue to be considered a carrier subject to the provisions of sections 20(1) to (10), inclusive, and 20a(2) to (11), inclusive, of the Interstate Commerce Act, as previously provided, (unless and until otherwise ordered by this Commission) in our order of June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239, in which we retained jurisdiction to make such further order or modification of the order as might thereafter be necessary or appropriate.

It further appearing, That by orders dated September 24, and 30, 1954, and December 20, 1954, the United States Securities and Exchange Commission (S.E.C.) was permitted to intervene in the above-entitled proceedings for

the limited purpose of filing its memorandums dated September 14, 1954, and December 14, 1954, in opposition to this Commission's finding the Alleghany Corporation to be a carrier subject to sections 20(1) to (10), inclusive, and 20a(2) to (11), inclusive, of the Interstate Commerce Act, as provided by section 5(3) thereof; that the said memorandums were filed pursuant to permission granted by the said orders; and that Alleghany and Central filed replies.

It further appearing, That on February 4, 1955, Breswick & Company, independent investor and stockholder in Alleghany and Central, fileda petition for leave to intervene in the above-entitled proceedings, asserting that upon Alleghany and Central, filed a petition for leave to intervene in Chesapeake and its related carriers, on or about January 19, 1954, the above-mentioned order of June 5, 1945 automatically became of no force and effect and Alleghany's status as a carrier subject to the Interstate Commerce Act terminated; that subsequently Alleghany filed Finance Docket No. 18656, solely to avoid regulation by the S.E.C. under the [fol. 519-520] Investment Act of 1940; that in the said proceeding the question of the exercise of jurisdiction to regulate Alleghany is at issue, and its determination is of great importance to the petitioner and other investors in Alleghany; and further asserting that the question of control of Central is, or may be at issue in these proceedings, and that determination of that issue is of great importance to the petitioner and other investors in Central.

It further appearing, That the said petition to intervene in the above-entitled proceedings is accompanied by the petitioner's request to dismiss the application in Finance Docket No. 18656; motion to deny the said application as to Alleghany; request that the said petitioner be permitted to join in the motions accompanying the petition for leave to intervene filed January 11, 1955, by Lewis D. Gilbert and John Gilbert; and request for such other and further relief as may be proper.

It further appearing, That on February 10, 1955, Alleghany filed its reply to the said petition and to the motions attached thereto.

It further appearing, That the Commission has entered

no order changing or modifying the order of June 5, 1945, in Finance Docket No. 14692, and that Alleghany's status as a carrier subject to the Act will remain in force and effect pending final determination of the proceeding instigated by the Commission on June 22, 1954, ordering Alleghany to show cause why the said order of June 5, 1945, so far as it applied to Alleghany, should not be vacated and set aside and be no longer of any force and effect.

It further appearing, That the interests of the said petitioner are not shown to pertain to the terms and conditions of the proposed merger, modification of lease, and resulting internal rearrangement of the applicants' corporate structure, and are not shown to be different from the interests of all other holders of the same classes of stock of Alleghany and Central.

It further appearing, That consideration and disposition of the issues presented in the above-entitled proceedings do no require determination of indirectly related matters which the petitioner alleges might raise other issues affecting the interests of investors and stockholders in Alleghany and Central.

And it further appearing, That the said petition and motions, in part, contemplate a broadening of the issues in the proceedings herein beyond the jurisdiction conferred upon this Commission by the Interstate Commerce Act, and beyond the scope of the application filed by the applicants herein.

It is ordered, That the said petition filed by Breswick & Company for leave to intervene in the above-entitled proceedings, and the request for oral argument, be, and they are hereby denied.

By the Commission, division 4, George W. Laird, Secretary.

[fol. 521] BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of the Application of

ALLEGHANY CORPORATION

Under Section 20a of the Interstate Commerce Act for Authority to Issue Not Exceeding 1,367,440 Shares of 6% Convertible Preferred Stock in Connection with an Exchange of Such Stock for Shares of Its Cumulative 5½% Preferred Stock Series A, and to Issue Not Exceeding 14,768,352 Shares of Its Common Stock upon Conversion of Such Convertible Preferred Stock.

ALLEGHANY'S APPLICATION FOR AUTHORITY TO ISSUE CONVERTIBLE PREFERRED STOCK—Filed Feb. 18, 1955

To the Interstate Commerce Commission:

As required by the Order of the Commission, Division 4, dated August 9, 1946, as amended, prescribing Rules and Regulations governing applications under Sections 20a and 214 of the Interstate Commerce Act, the following information is shown:

49 CFR § 56.1—*Form and Contents of Application*

(a) The full and correct name and business address of the applicant (hereinafter sometimes called "Alleghany" or the "Corporation") are:

Alleghany Corporation

4500 Chrysler Building

New York 17, New York

(b) Alleghany is a corporation, incorporated under the laws of the State of Maryland on January 26, 1929. Alleghany is also authorized to do business in the States of Delaware and New York.

(c) Alleghany is not a common carrier by railroad or otherwise, but by order of the Commission entered June 5, [fol. 522] 1945, in Finance Docket No. 14692, *Chesapeake & Ohio Railway Company Purchase, Etc.*, 261 ICC 239, is to be considered as a carrier subject to the provisions of Sec-

tion 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive of the Interstate Commerce Act.

(d) Alleghany is not a carrier. See paragraph (c) above.

(e) This application is made under Section 20a of the Interstate Commerce Act for authority to Alleghany to issue not exceeding 1,367,440 shares of 6% Convertible Preferred Stock (herein sometimes referred to as "6% Preferred Stock") in connection with an exchange of such Stock for shares of its present Cumulative 5½% Preferred Stock Series A (herein referred to as "Series A Preferred Stock"), and to issue not exceeding 14,768,352 shares of its Common Stock upon conversion of such 6% Convertible Preferred Stock.

Alleghany's Board of Directors, at a special meeting held in New York, New York, on December 28, 1954 (see Exhibit 2), duly resolved that it was advisable that Alleghany's Certificate of Incorporation be amended so as to create 1,367,440 shares of a new class of stock to be known as 6% Convertible Preferred Stock, of the par value of $10 per share, junior to the class of $4 Prior Preferred Stock of Alleghany and senior to the existing class of Preferred Stock (of which Series A Preferred Stock is a series) and the Common Stock of Alleghany, and to increase the authorized shares of Common Stock from 12,350,000 shares to 22,000,000 shares so as to provide a sufficient number of shares of Common Stock into which the 6% Preferred Stock will be convertible, and directed that the proposed amendments be submitted for action at the Special Meeting of Stockholders, held at Baltimore, Maryland, on February 8, 1955. At such Special Meeting, as required by Alleghany's Certificate of Incorporation, the holders of two-thirds of the outstanding shares of Alleghany's $4 Prior Preferred Stock and the holders of a majority of the outstanding shares of its Series A Preferred Stock, and of its Common Stock, voting as separate classes, approved the proposed amendments (see Exhibit 2-A). On February 8, 1955, and February 15, 1955 appropriate Articles of Amendment of Alleghany's Certificate of Incorporation were duly filed with the State Tax Commission of the State of Maryland (see Exhibit 1).

Pursuant to such authorization, the Executive Committee of Alleghany's Board of Directors, at a special meeting held

on February 9, 1955 (see Exhibit 2-B), authorized, subject to receipt of the necessary authorization of this Commission [fol. 523] not later than May 31, 1955, the issuance of not exceeding 1,367,440 shares of 6% Convertible Preferred Stock, of the par value of $10 per share, in connection with an exchange (hereinafter sometimes referred to as the "Exchange Offer") of such Stock for shares of its present Series A Preferred Stock, of the par value of $100 per share, and the issuance of not exceeding 14,768,352 shares of its Common Stock upon conversion of such 6% Convertible Preferred Stock.

The Exchange Offer, subject to said authorization by this Commission, invites the holders of shares of Alleghany's Series A Preferred Stock to exchange all of such shares outstanding for Alleghany's new 6% Convertible Preferred Stock, on the basis of ten shares of 6% Convertible Preferred Stock for each share of Series A Preferred Stock. The Exchange Offer is also made subject to the further condition that 100,000 shares of Series A Preferred Stock, or such lesser number as Alleghany's Board of Directors may deem sufficient to warrant consummation of the Exchange Offer, be duly surrendered for exchange, all as more fully set forth herein under "Details of Exchange Offer" (see Exhibit 18).

If the Exchange Offer is consummated, Alleghany's Board of Directors intends, following the issuance of the required number of shares of 6% Convertible Preferred Stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of Series A Preferred Stock at the rate of $5.50 per share per annum. Because of the uncertainty as to the number of shares of Series A Preferred Stock which may be surrendered for exchange, Alleghany's Board of Directors is not prepared presently to decide whether it will call for redemption the shares of outstanding Series A Preferred Stock which shall not have been exchanged under the Exchange Offer, or to what extent, except as hereinabove stated, it will pay dividends on account of arrearages on the shares of Series A Preferred Stock then outstanding.

Alleghany has certain existing bank loans, two of which are evidenced by promissory notes authorized by this Com-

mission, one issued to The Chase National Bank of the City of New York (see Finance Dockets Nos. 17423, 17005, 16567, and 16214), and the other to The First National Bank of Boston (see Finance Docket No. 17871). Alleghany has agreed, in connection with these two loans, as well as in the Indenture pursuant to which its 5% Sinking Fund Debentures, due November 1, 1962 (see Finance Docket No. 17937) were issued, among other things, not to pay or declare any [fol. 524] dividend (other than a stock dividend) or to purchase, redeem or otherwise retire any shares of its capital stock otherwise, than in exchange for other shares of its capital stock, without the consent of such Banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should Alleghany decide to redeem unexchanged shares of Series A Preferred Stock, such redemption might conceivably require the consent of such Banks and debenture holders.

Details of Exchange Offer

Alleghany is giving to each of the holders of its Series A Preferred Stock an opportunity to exchange his shares pursuant to the Exchange Offer (see Exhibit 18) herein described and for that purpose will submit to each such Stockholder an Exchange Offer and a Letter of Transmittal (see Exhibit 15) to accompany the stock certificates surrendered for exchange.

The Exchange Offer is open to all holders of Alleghany's Series A Preferred Stock until 3:30 P.M. Eastern Standard Time (or until 3:30 P.M. Eastern Daylight Saving Time, if such time is then in effect in the City of New York) on the "Closing Date", which term means the fifth day (excluding Saturday, Sunday, and any legal holiday) after this Commission shall have issued, not later than May 31, 1955, an Order substantially in the form requested authorizing the issuance by Alleghany of not exceeding 1,367,440 shares of 6% Convertible Preferred Stock and the issuance of not exceeding 14,768,352 shares of Common Stock upon the conversion of such 6% Convertible Preferred Stock. Any Series A Preferred Stockholder may accept the Exchange

Offer and deposit for exchange all or any number of full shares of such Stock held by him.

Any Series A Preferred Stockholder may revoke his acceptance of the Exchange Offer in whole or in part and direct the return of the deposited shares by giving written notice thereof to the Exchange Agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 P.M. on the Closing Date. As soon as practicable after the Closing Date, if 100,000 shares of Series A Preferred Stock, or such lesser number as Alleghany's Board of Directors may deem sufficient to warrant consummation of the Ex- [fol. 525] change Offer, have been accepted by the Exchange Agent for exchange, Alleghany will issue and deliver the required number of shares of 6% Convertible Preferred Stock, in temporary form, in accordance with the instructions set forth in the respective Letters of Transmittal which accompany the stock certificates surrendered for exchange.

As was the case under the terms of previous exchange offers made from time to time to holders of Series A Preferred Stock, Alleghany has reserved the right, at its election, to extend the Exchange Offer for an additional period or periods. If any such extension or extensions of the Exchange Offer are made, the Corporation will, promptly after the Closing Date, and after the termination of any period of extension, so notify its remaining Series A Preferred Stockholders. Thereafter, any holder of unexchange Series A Preferred Stock may exchange any or all of his remaining shares at any time prior to the termination of such period or periods of extension. Regardless of such possible extension or extensions, the conversion rights of the 6% Preferred Stock shall be fixed as of the Closing Date, as above defined, and all shares tendered for exchange on or before 3:30 P.M. on the Closing Date will be exchanged as of such date.

If Alleghany determines not to consummate the Exchange Offer because less than 100,000 shares of Series A Preferred Stock have been duly submitted for exchange, or if this Commission shall not have issued, on or before May 31, 1955, an appropriate Order granting Alleghany's application for authorization of the issuance of the 6% Convertible Preferred Stock and Common Stock upon the conversion of such 6% Convertible Preferred Stock, or if this Commission

shall issue an Order denying any material portion of Alleghany's application, or if this Commission shall issue an Order authorizing the transaction upon terms and conditions different from those set forth in Alleghany's application and such authorization shall not be acceptable to Alleghany, then, in any such case, the Exchange Offer shall be void and of no effect and Alleghany will instruct the Exchange Agent to return to each Series A Preferred Stockholder the certificates delivered by such Stockholder to the Exchange Agent.

The Exchange Offer is not subject to any conditions other than those set forth above. All shares of Series A Preferred Stock which are exchanged in accordance with the Exchange Offer will be retired by Alleghany. All costs and expenses [fol. 526] of the exchange (other than transfer taxes, if any, and expenses, if any, of Series A Preferred Stockholders in delivering their shares to the Exchange Agent in accordance with the provisions of the Letter of Transmittal) will be borne by Alleghany.

As of January 31, 1955, Mr. Allan P. Kirby, the President and a Director of Alleghany, was the beneficial owner of 12,959 shares of Series A Preferred Stock*; Mr. Robert R. Young, Chairman of the Board of Directors of Alleghany, was the beneficial owner of 11,087 shares of Series A Preferred Stock; Mrs. Anita O'Keeffe Young, wife of Mr. Robert R. Young, was the beneficial owner of 3,738 shares of Series A Preferred Stock, and Mr. Andrew Van Pelt, a Director of Alleghany, was the beneficial owner of 500 shares of Series A Preferred Stock. These holdings aggregate 28,284 shares, or approximately 20.7 per cent, of the total of 136,744 shares of Series A Preferred Stock outstanding in the hands of the public. Mr. and Mrs. Young, and Messrs. Kirby and Van Pelt have informed Alleghany

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* As of January 31, 1955, a personal holding company in which Mr. Kirby has an interest, owned 200 shares of Series A Preferred Stock. Mr. Kirby is President of a charitable corporation, in which he has no financial interest, which owned, on January 31, 1955, 1,162 shares of Series A Preferred Stock and 6,700 shares of Common Stock of Alleghany.

that they each have a present intention, if substantially all shares of Series A Preferred Stock are tendered in exchange for 6% Preferred Stock of the Corporation, to tender all of their holdings of Series A Preferred Stock in exchange therefor. If the Exchange Offer is consummated on a basis of less than substantially all shares of Series A Preferred Stock being tendered, such persons presently intend to tender approximately the same proportion of their holdings, as compared with the total number of such shares then outstanding, as are tendered by all other persons. However, none of these Stockholders has entered into any agreement with Alleghany, or is under any other obligation, to exchange shares of Series A Preferred Stock under the Exchange Offer. Furthermore, each of them, in expressing his present intention, has reserved to himself full right to take whatever action under the Exchange Offer he deems desirable in his own interest under all the circumstances which may exist at the time such Stockholder may make his final decision.

Alleghany has a supply of stock certificates representing all three classes of its presently outstanding shares which it proposes to use until exhausted. All such certificates issued subsequent to February 8, 1955, the effective date of the amendment creating the 6% Convertible Preferred Stock, [fol. 527] will have had imprinted in red, on the reverse thereof, a form of legend referring to the relative position in Alleghany's capital structure of the 6% Convertible Preferred Stock (see Exhibit 5-B). In due course new stock certificates will be prepared representing shares of Alleghany's three different classes of stock presently outstanding, which certificates will be identical on their face to the presently authorized certificates, but will bear on the reverse thereof a complete statement of the various rights and preferences of Alleghany's different classes of stock.

Description of 6% Convertible Preferred Stock and Comparison with Series A Preferred Stock

The provisions of Article Sixth of Alleghany's Certificate of Incorporation, as amended, setting forth the preferences, voting powers, restrictions, and qualifications of the 6% Convertible Preferred Stock are set forth in Exhibits 1, 2,

and 2-A. There are presently authorized, but unissued, 1,367,440 shares of 6% Convertible Preferred Stock, of the par value of $10 per share, junior to the class of $4 Prior Preferred Stock of Alleghany and senior to all other classes of Alleghany's stock. There are also presently authorized 1,195,000 shares of Series A Preferred Stock, of the par value of $100 per share, senior to the Common Stock of Alleghany. Of this number, 144,544 shares are issued, 7,800 shares are held in Alleghany's treasury and 136,744 shares are outstanding in the hands of the public.

The rights of holders of the 6% Preferred Stock and the Series A Preferred Stock will be similar in many respects, but there will be substantial points of distinction as mentioned hereafter. The following statements do not purport to be a complete statement of all rights of the holders of 6% Preferred Stock or of Series A Preferred Stock, nor do such statements necessarily give full effect to provisions of statutory or common law. These statements are subject in all respects to the provisions of the Certificate of Incorporation, as amended, and the following statements are qualified in their entirety by the foregoing.

Seniority and Par Value

The 6% Preferred Stock is senior to the Series A Preferred Stock, and to the shares of authorized but unissued Preferred Stock of which class the Series A Preferred Stock is a series. The 6% Preferred Stock is of the par value of $10 per share, whereas the Series A Preferred Stock is of [fol. 528] the par value of $100 per share. Accordingly, for the purposes of this comparison, it must be remembered that the Exchange Offer is on the basis of 10 shares of 6% Preferred Stock in exchange for each share of Series A Preferred Stock.

Dividend Rights

The Series A Preferred Stock is entitled to cumulative dividends at the rate of 5½% per annum on the par value thereof ($100) in preference to Common Stock, whereas the 6% Preferred Stock is entitled to cumulative dividends at the rate of 6% per annum on the par value thereof ($10) in preference to both the Common Stock and the Series A

Preferred Stock. Dividends on the 6% Preferred Stock do not commence to accrue until May 1, 1955 and shall be cumulative from such date. The first of such accrued dividends will be payable October 1, 1955. The redemption value used in the conversion formula set forth below takes into account the fact that dividends on the 6% Preferred Stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor.

Rights on Liquidation, Dissolution or Redemption

Regarding 10 shares of the 6% Preferred Stock as the equivalent of 1 share of the Series A Preferred Stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6% Preferred Stock before any payment is made to the holders of the Series A Preferred Stock. However, because the dividend arrearages on the Series A Preferred Stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of one share of Series A Preferred Stock on May 1, 1955 will be $237, whereas the cash redemption value of 10 shares of 6% Preferred Stock on that date would aggregate $105, the difference representing the accumulated and unpaid dividends aggregating $132 as of that date with respect to the Series A Preferred Stock.

The holders of the 6% Preferred Stock upon the voluntary liquidation or dissolution of the Corporation, or upon redemption, are entitled to receive, before any payment shall be made to the holders of the Prefered Stock or the Common [fol. 529] Stock, $10.50 per share of such stock, plus all dividends accumulated and unpaid thereon, whether or not earned or declared. The holders of such stock, upon the involuntary liquidation or dissolution of the Corporation, are entitled to receive $10 per share, plus all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of Series A Preferred Stock is in each instance referred to in this paragraph entitled to an amount (exclusive of dividend arrearages) equal to ten times the

equivalent amount set forth with respect to each share of 6% Preferred Stock.

There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the Corporation is by the express terms of its Certificate of Incorporation precluded from redeeming any shares of the 6% Preferred Stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of the Series A Preferred Stock.

Preemptive Rights

Neither class of stock is entitled to preemptive rights.

Sinking Fund

The Series A Preferred Stock is entitled to the benefits of a sinking fund, the provisions with respect to which are not operative at the present time because of accumulated dividends in arrears on the Series A Preferred Stock. There is no provision for a sinking fund with respect to the 6% Preferred Stock.

Voting Rights

In case of default in the payment of four quarterly instalments of dividends on Series A Preferred Stock, or the elapsing of twenty-four consecutive months during which the Corporation shall at no time have fully paid up all dividends due on such stock, such stock is entitled to elect two directors of the Corporation. Series A Preferred Stock is at the present time so entitled to elect directors. Accordingly, the holders of the Series A Preferred Stock, including Messrs. Young, Kirby and Van Pelt (whose holdings of Series A Preferred Stock are stated on page 6 hereof), to the extent that they do not exchange all of their shares of Series A Preferred Stock, will retain this contingent right to elect two directors until such shares are redeemed or re- [fol. 530] tired. The holders of the 6% Preferred Stock, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid.

Conversion Rights

The Series A Preferred Stock is not convertible. The 6% Preferred Stock is convertible into Common Stock at a rate which has been fixed by the Board of Directors in accordance with the following conversion formula. The holder of each share of the 6% Preferred Stock, at any time prior to five days before its redemption, will, upon payment to the Corporation of $3.75 per share of Common Stock into which such share is convertible, be entitled to convert such share of 6% Preferred Stock into such number of fully paid and non-accessible shares of Common Stock of the Corporation as shall be arrived at by dividing (1) 23.7 (being 1/10 of the May 1, 1955 redemption price of Series A Preferred Stock) by (2) the difference between $3.75 and an amount equal to the closing price of the Corporation's Common Stock on the New York Stock Exchange on the Closing Date of the Exchange Offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6% Preferred Stock be convertible into more than 10.8 shares of Common Stock of the Corporation. At the time of original issuance of the 6% Preferred Stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of Common Stock into which each share of 6% Preferred Stock is convertible upon payment of $3.75 per share of Common Stock. No fractional shares or scrip representing fractional shares shall be issued upon the conversion of any share or shares of 6% Preferred Stock. If the aggregate number of shares of 6% Preferred Stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of Common Stock, the number of shares of Common Stock issuable upon such conversion shall equal such whole number, and an amount equal to (1) such fraction multiplied by (2) the excess of the closing price on the New York Stock Exchange of the Corporation's Common Stock on the effective date of such conversion (or if no sale took place on such date

[fol. 531] then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 shall be paid in cash by the Corporation to such holder. In the event of any reclassification, exchange or other change of the Common Stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of Common Stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of 6% Preferred Stock will be adjusted accordingly.

Miscellaneous Provisions

The affirmative approval of the holders of a majority of the outstanding shares of Series A Preferred Stock is required before the Corporation may issue any additional shares of such stock or of any other class of stock on a parity with or having priority over such stock. The issuance of any shares on a parity with or prior to shares of 6% Preferred Stock or the making of any material change in the Certificate of Incorporation, or the By-Laws of the Corporation, with respect to the 6% Preferred Stock requires the affirmative approval of the holders of two-thirds of the outstanding shares of 6% Preferred Stock .

Listing on New York Stock Exchange

The Series A Preferred Stock and the Common Stock are listed on the New York Stock Exchange. The Corporation intends to make a timely application for the listing on the New York Stock Exchange of the 6% Preferred Stock and of the shares of Common Stock into which such 6% Preferred Stock may be converted, each upon official notice of issuance thereof.

Transfer Agent and Registrar

J. P. Morgan & Co. Incorporated, 23 Wall Street, New York 8, New York, has been named as Transfer Agent for the 6% Preferred Stock and Colonial Trust Company, 90 Wall Street, New York 5, New York, has been named as the Registrar of such Stock.

[fol. 532] *Description of Common Stock*

There are authorized 22,000,000 shares of Common Stock having a par value of $1.00 per share. As of January 31, 1955, 4,641,585 shares were issued and outstanding in the hands of the public, there being approximately 15,120 holders thereof, 410,032 shares were reserved for issuance upon conversion of the presently outstanding $4 Prior Preferred Stock, 1,999,700 shares were reserved for issuance upon exercise of the presently outstanding Common Stock Subscription Warrants of the Corporation and 100,000 shares were reserved for issuance upon exercise of previously granted options. Common Stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of Common Stock, to be sold to directors, officers and employees of the Corporation, upon exercise of options or otherwise, but such shares have not yet been sold, options covering such shares have not yet been granted and such shares have not been reserved.

Each holder of Common Stock is entitled to one vote for each share of such Stock on matters upon which such Stock is entitled to vote including the election of directors when in order. At present the By-Laws provide that four directors are to be elected by the holders of the Common Stock. The holders of the 6% Preferred Stock, voting as a class, are, however, entitled to elect two additional directors of the Corporation at each annual meeting, as are the holders of the $4 Prior Preferred Stock, and the holders of the Series A Preferred Stock are now also entitled to elect two directors by reason of the existing default in the payment of dividends on such Stock. There is no provision for cumulative voting of Common Stock. Upon any liquidation or dissolution of the Corporation, the holders of Common Stock are entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the Corporation's classes of preference shares.

Article Ninth of the Corporation's Certificate of Incorporation provides that the holders of Common Stock are entitled to purchase ratably according to their respective holdings any shares of Common Stock (voting or non-voting) of the Corporation issued or sold for cash, and any

stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such Common Stock for cash, in either case upon appropriate terms, [fol. 533] but with certain specific exceptions, one of which includes any shares of Common Stock issued upon conversion of preferred stock convertible into Common Stock. Consequently, the shares of Common Stock proposed to be issued and sold upon conversion of the 6% Preferred Stock would not be subject to preemptive rights.

The $3.75 which the Corporation will receive for each share of Common Stock issued upon conversion of the 6% Preferred Stock will be used by the Corporation for its general corporate purposes.

As of January 31, 1955, there were issued and outstanding Common Stock Subscription Warrants of the Corporation in bearer form entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase, 1,999,700 shares of the authorized but unissued Common Stock of the Corporation at a price of $3.75 per share, and shares of such Stock have been reserved for this purpose. Such Warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the Corporation and no dividend or interest is payable or accrues with respect thereto or to the shares of Common Stock which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such Warrants are exercised. Such Warrants are listed on the American Stock Exchange.

(f) In September of 1946, Alleghany inaugurated a program of purchasing in the open market its own outstanding Prior Preferred Convertible and Series A Preferred Stocks, and of presenting to the holders of said preference stocks a series of exchange offers and invitations for tenders, with the objectives of eliminating the capital deficit inherited by the present management in 1937, benefiting the remaining holders of such preference stocks, and ultimately restoring an asset equity for the Common Stock. The details of this program are fully set forth in Finance Docket No. 17937.

As a result of these reacquisitions, Alleghany has eliminated the Prior Preferred Convertible Stock from its capital structure and drastically reduced the amount of Series A

Preferred Stock outstanding. Substantial amounts of dividend arrearages have been eliminated, the capital deficit has been wiped out, and the holders of all classes of its remaining outstanding stock have been greatly benefited. As of January 31, 1955, Alleghany's Common Stock had a net asset value of $6.50 a share and the Series A Preferred Stock had a net asset value of $451.30 a share.

[fol. 534] The proposed issuance of 6% Convertible Preferred Stock pursuant to the Exchange Offer would result in a further substantial reduction in the dividend arrearage on the Series A Preferred Stock and a subsequent redemption of the unexchanged shares of Series A Preferred Stock, if such should be accomplished, would complete the elimination of such arrearage. Elimination of such dividend arrearage would place Alleghany's capital structure on a current basis for the first time in over twenty years.

In the opinion of Alleghany's management, the Exchange Offer of ten shares of 6% Preferred Stock for each share of Series A Preferred Stock is in the best interests of the Corporation and of the holders of all three of its present outstanding classes of stock. No dividends were paid by the Corporation on any class of its stock from May 1, 1931 through the year 1949, nor were any dividends paid on any class of its stock in 1953. Dividends were paid by the Corporation on the Prior Preferred Convertible Stock in the years 1950, 1951 and 1952 in the respective amounts of $2.50, $5 and $10 per share. Dividends were paid by the Corporation on the $4 Prior Preferred Stock in 1954 in the amount of $4 per share. The aggregate cash dividends declared and paid by the Corporation in the years 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470 and $103,380, respectively. Assuming that the Exchange Offer is completed on a maximum basis (136,744 shares of Series A Preferred Stock being exchanged), and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 Prior Preferred Stock and 1,367,440 shares of 6% Preferred Stock, the aggregate dividend requirements for each class of said stock would be $103,380 and $820,464, respectively. The payment of dividend is, of course, dependent upon the earnings and financial condition of the Corporation. While neither the dividend requirements of the Series A Preferred

Stock nor of the 6% Preferred Stock were earned from portfolio income in either 1953 or 1954, management fully expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. Management also expects to realize substantial income from the sale of securities. Such income is also available for the payment of dividends.

If all of the shares of Series A Preferred Stock are exchanged, the present dividend arrearages with respect to the Series A Preferred Stock will be removed without the expenditure of any cash by Alleghany. If 100,000 shares of Series A Preferred Stock are exchanged, the dividend [fol. 535] arrearage on remaining Series A Preferred Stock could be removed with the expenditure by Alleghany of about one-fourth the amount of cash which would be required if the dividend arrearage on all of the presently outstanding Series A Preferred Stock were to be paid. Inasmuch as there is no dividend arrearage on the $4 Prior Preferred Stock, and dividends are currently being paid thereon, the new 6% Preferred Stock would be entitled to receive dividends on a current basis and the Corporation would not be prevented solely by a dividend arrearage on senior stock from paying dividends to the holders of its Common Stock. The aggregate amount of dividend accumulations on the Series A Preferred Stock as of January 31, 1955 was $17,862,185, or $130.625 per share.

The consummation of the Exchange Offer will result in substantial changes in the rights of the holders of the Series A Preferred Stock who exchange their stock. Such changes are discussed elsewhere herein, principally under the heading "Description of 6% Convertible Preferred Stock and Comparison with Series A Preferred Stock."

By virtue of the conversion rights of the 6% Preferred Stock, it is expected that the persons exchanging Series A Preferred Stock will be afforded an opportunity to participate in the progress of the Corporation, as reflected in the market value of its Common Stock. The existence of such conversion rights will not have any immediate effect on the Common Stock but the exercise of such conversion rights will at that time have the effect of diluting the rights of Common Stockholders, as such rights then exist.

If all of the outstanding shares of Series A Preferred Stock are surrendered for exchange pursuant to the Exchange Order, all dividend arrearages on senior classes of stock would be wiped out and the Corporation would be legally entitled to begin the payment of dividends on Common Stock. If less than all of the outstanding shares of Series A Preferred Stock are surrendered for exchange, the Corporation would not be legally entitled to begin the payment of dividends on Common Stock until the remaining shares of Series A Preferred Stock were redeemed or full payment made of the cumulative dividend arrearages theron.

To the extent that shares of Series A Preferred Stock might ultimately be redeemed rather than exchanged, or dividend arrearages thereon might ultimately be paid in cash, the assets of the Corporation would be reduced by the amount of cash expended, and, as a consequence, the income of the Corporation might reasonably be expected to be [fol. 536] reduced accordingly. It should be noted that the aggregate accrued dividends on all presently outstanding shares of Series A Preferred Stock on May 1, 1955, would be $18,050,208 and if it were assumed that payment of such accrued dividends was to be made on that date, such payment would require the liquidation of a substantial part of the Corporation's portfolio of investments with a resulting loss in earning power.

The effect on the present Common Stock of the exercise of the conversion rights of the 6% Preferred Stock is substantial and should be noted. Assuming that the Exchange Offer is completed and that the 136,744 presently outstanding shares of Series A Preferred Stock are exchanged and ultimately converted into shares of Common Stock, there would be required to be issued, applying the conversion formula mentioned above on the basis of the closing price of the Common Stock on the Closing Date being $6 per share, 14,358,120 shares of Common Stock, and applying it on the basis of the closing price of the Common Stock on the Closing Date being $8.375 per share, 6,973,944 shares of Common Stock. Therefore, the shares of Common Stock ultimately issuable to the present holders of the Series A Preferred Stock will represent, on the first of the foregoing assumptions, approximately 75.6%, and on the second of

the foregoing assumptions, approximately 60.1%, of all shares of Common Stock outstanding upon giving effect to such conversions. However, it should also be noted that in connection with the exercise of such conversion rights of the 6% Preferred Stock, and on the basis of the first of the foregoing assumptions, the Corporation will receive an aggregate of $53,842,950 and on the second of the foregoing assumptions an aggregate of $26,152,290, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion), which cash will be available for working capital and investment.

(g) The prices, terms, and conditions of the proposed issuance of 6% Convertible Preferred Stock, and Common Stock upon conversion thereof, which are the subjects of this application, have been heretofore described.

During the period January 1 to January 31, 1955, the high and low sales prices for Alleghany's Series A Preferred Stock were 228 high and 209½ low. Within the period 1949-1954, inclusive, the range in price of the Series A Preferred Stock was 210 high and 40½ low.

[fol. 537] During the period January 1 to January 31, 1955, the high and low sales prices for Alleghany's Common Stock were 9½ high, and 7¼ low. Within the period 1949-1954, inclusive, the range in price of the Common Stock was 9 high and 2⅛ low.

Expenses to be incurred in connection with the proposed issuance of 6% Convertible Preferred Stock, and Common Stock upon conversion thereof, are estimated roughly at a minimum of $70,580, as set forth in the statement filed herewith as Exhibit 16. As therein noted, Alleghany is presently unable to estimate the amount of certain anticipated items of expense, owing to the conditional nature of the proposed transactions set forth in this application.

(h) No contracts, underwritings, or other arrangements have been or are proposed to be made in connection with the proposed issuance of 6% Convertible Preferred Stock, or Common Stock upon conversion thereof, other than an Agreement with Kidder, Peabody & Co. (herein called the "Dealer Manager"), whereby the Dealer Manager agrees to use its best efforts to form and manage a group of secur-

ities dealers, including itself, all of whom are either members of the National Association of Securities Dealers, Inc., or, if foreign dealers not eligible for membership in said Association, have agreed to conform to the Rules of Fair Practice of such Association, to solicit acceptances of the Exchange Offer by holders of Series A Preferred Stock (see Exhibit 17).

All dealers so qualified are invited to become members of such group by entering into a Soliciting Dealer's Agreement with the Dealer Manager and to solicit acceptances by Series A Preferred Stockholders of this Exchange Offer. For such services, dealers who are members of such group, including the Dealer Manager, will receive, where such a fee may properly be paid, a commission of $1.00 for each share of Series A Preferred Stock submitted through them to the Exchange Agent and exchanged in accordance with the Exchange Offer; provided, however, that the maximum aggregate commissions payable with respect to any single exchanging holder will be $300, except in certain cases in which the stock is beneficially owned by others.

The Dealer Manager will be reimbursed for its out-of-pocket expenses up to, but not in excess of, $2,000, and if the Exchange Offer is consummated, will receive the additional sum of $10,000 as a flat fee for its services.

[fol. 538] All fees, expenses and commissions are to be paid by the Corporation. The Corporation itself will not solicit exchanges under the Exchange Offer. Solicitations are authorized to be made only by dealers or their salesmen qualified to act in their respective states.

The Dealer Manager is not authorized to act as agent of the Corporation. Soliciting Dealer's Agreements, between the Dealer Manager and soliciting dealers, provide that soliciting dealers are not authorized to give any information or to make any representations in connection with the Exchange Offer other than as contained in the Exchange Offer and in other authorized solicitation material, if any, and provide further that soliciting dealers are not authorized to act as agents of the Corporations or of the Dealer Manager.

The very nature of the proposed transaction is such that competitive bids could not be solicited either in respect of

the issuance of the 6% Convertible Preferred Stock, or the Common Stock upon conversion thereof. In any event it appears that both aspects of the transaction are specifically excepted from the competitive bidding requirements set forth in the Commission's Report in *Ex Parte* 158, 257 ICC 129, at page 164, by reason of the following exclusionary clauses:

> "(1) Common and preferred stocks;
>
> "(2) Securities sold or otherwise issued pro rata to existing holders of securities of the issuing company pursuant to any preemptive right or privilege or in exchange for or extension of outstanding securities, or in connection with any liquidation, reorganization, or financial adjustment;"

If, however, there is any doubt whether any aspect of the transaction is specifically excepted from the competitive bidding requirements, Alleghany respectfully requests that the Commission specifically find that an adequate showing for exception from such requirements has been made in the present application.

(i) The proposed plan for issuance of 6% Convertible Preferred Stock, the issuance of Common Stock upon conversion thereof, the making of the Exchange Offer, the making and filing of this application, and all other necessary matters, were authorized by Alleghany's Board of Directors and the Executive Committee thereof at special meet- [fol. 539] ings held on December 28, 1954, and February 9, 1955, respectively (see Exhibits 2 and 2-B). At the Special Meeting of Stockholders held in Baltimore, Maryland, on February 8, 1955 (see Exhibit 2-A), the requisite amendments to Alleghany's Certificate of Incorporation, to create the new class of 6% Convertible Preferred Stock, was duly approved, and also on February 8, 1955 and February 15, 1955, appropriate Articles of Amendment of Alleghany's Certifiacte of Incorporation were duly filed with the State Tax Commission of the State of Maryland (see Exhibit 1).

Following are the names, titles, and post-office addresses of Alleghany's:

President: Allan P. Kirby, 4500 Chrysler Building, New York 17, New York.

Secretary: David W. Wallace, 4500 Chrysler Building, New York 17, New York.

Principal Attorney: Edward K. Wheeler, 704 Southern Building, Washington, D. C.

Officers or persons authorized to sign, verify, and file this application on behalf of Alleghany:

Robert R. Young, Chairman of the Board of Directors, 230 Park Avenue, New York 17, New York.

Allan P. Kirby, President, 4500 Chrysler Building, New York 17, New York.

Thomas J. Deegan, Vice-President, 230 Park Avenue, New York 17, New York.

David W. Wallace, Secretary and Treasurer, 4500 Chrysler Building, New York 17, New York.

(j) The name, title, and post-office address of counsel to whom correspondence in regard to this application should be addressed:

Edward K. Wheeler, Esq., Wheeler & Wheeler, 704 Southern Building, Washington, D. C.

[fol. 540] PRAYER

Wherefore, the applicant prays that the Interstate Commerce Commission issue an order herein, under Section 20a of the Interstate Commerce Act, and any other applicable provisions of said Act, authorizing the applicant to issue not exceeding 1,367,440 shares of 6% Convertible Preferred Stock in connection with an exchange of such Stock for shares of its Series A Preferred Stock, and to issue not exceeding 14,768,352 shares of its Common Stock upon conversion of such 6% Convertible Preferred Stock, in the manner and for the considerations, uses, and purposes hereinabove stated, and for all other necessary orders or author-

ity in the premises, as the Commission may deem necessary or proper.

Dated February 16, 1955.

Respectfully submitted, Alleghany Corporation, By David W. Wallace, Secretary and Treasurer.

Burton K. Wheeler, Edward K. Wheeler, Counsel.

[fol. 541] BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

AMENDED PETITION OF BRESWICK & COMPANY FOR LEAVE INTERVENE—February 18, 1955

Comes now your petitioner, Breswick & Company,* by its attorney and Division 4 having denied its petition for leave to intervene, hereby files this Amended Petition for Leave to Intervene on the following new grounds:

I. The applicant Alleghany Corporation is not in control of either the New York Central or the Big Four Railroads in fact or in law and therefore has no standing to make the present application.

II. The proposed transactions do not come within the scope of Section 5(3).

III. The judicial cases hold that where a court is without jurisdiction in a particular case, its acts and

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* That petitioner is a stockholder in Alleghany Corporation is shown by the affidavit dated February 11, 1955, attached hereinafter as Exhibit A.

proceedings can be of no force or validity and are a mere nullity and void.**

Wherefore, petitioner prays that the Commission grant it leave to intervene and file the accompanying motion to dismiss the application of Alleghany Corporation, and to admit is as a party to the present proceedings.

Dated: February 18, 1955.

Respectfully submitted, Joseph B. Hyman, Attorney for Petitioner, 211 South Pitt Street, Alexandria, Virginia.

[fol. 542] MOTION OF BRESWICK & COMPANY TO DISMISS THE APPLICATION OF THE ALLEGHANY CORPORATION FOR LACK OF JURISDICTION

Comes now Breswick & Company, stockholder in the Alleghany Corporation, by its attorney, and respectfully moves the Commission to dismiss the application of the Alleghany Corporation in the above proceedings on the ground of lack of jurisdiction. In the event the Commission finds it has jurisdiction over Alleghany Corporation, petitioner requests that it find the continued control of Alleghany Corporation by Young and Kirby as not in the public interest, or that of its stockholders.

Your petitioner submits the following statement in support of this motion.

** For the convenience of the Commission, we reprint under III (a), (b), and (c) the matter bearing on this point in the original petition. The new grounds on this point are set forth hereinafter as III (d).

[fol. 543] STATEMENT

I. Applicant Alleghany Corporation is not in control of either New York Central or the big four in fact or in law, and thus has no standing to make the present application.

Alleghany Corporation, as of November 30, 1954, the date of its most recently published schedule of investments, owned only 577,000 shares of New York Central stock, of which 300,000 were in joint ventures with Murchison (or his sons) and Richardson.*

Young personally owns 100,200 shares, Kirby 300,100, Murchison (or his sons) 200,000, and Richardson 100,000 shares of New York Central. Murchison and Richardson's shares are now in joint ventures with Alleghany (which extend to 600,000 shares) under which said individuals are owners of all rights in the 300,000 shares but have agreed, for the present, to give Alleghany voting rights to said shares.

Since the four named individuals own 700,300 shares compared to Alleghany's 577,000 shares, it is obvious that they have a greater ownership interest in Central than Alleghany.

Alleghany at the moment claims to possess voting rights to 877,000 shares of Central. But the mere unexercised existence of this voting power obviously does not constitute an "acquisition of control."** When the control of Central last changed hands, on June 14, 1954, it passed from the old management board to the 15 new directors. Alleghany then owned no more than 11,400 out of 6,447,410 shares of

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* See Balance Sheet, dated November 30, 1954, and Schedule of Investments, as set forth in proxy statement of Alleghany Corporation, dated January 14, 1955, pp. 16-22.

** It should be noted that more than 2,000,000 shares voted for the old management were insufficient to maintain its control. See Fortune Magazine, August 1954, p. 87.

[fol. 544] Central stock,* obviously an insufficient amount to constitute an "acquisition of control." The individual nominees then personally *owned* 1,090,000 shares** and received votes by proxies running to themselves and associates individually for roundly another 2,310,000 odd shares.*** Of the 15 nominees so elected, only two are officers and directors of Alleghany, namely Young and Kirby, and a third (Van Pelt, who has since resigned) was an Alleghany director. Mathematical, legal, and actual control of Central was thus acquired by 12 non-Alleghany officials. The 3 Alleghany officials also elected acted in their individual capacities as Central stockholders and not as Alleghany's trustees. Each of the 12 non-Alleghany directors are independent personalities with equal and independent authority in law. At no time have they lost their mathematical, actual and legal control of Central's board.

Alleghany has no way lawfully of compelling said 12 directors to obey its wishes. Consequently, it does not have actual or legal control, nor the actual or legal power to control Central, or the Big Four railroad.

Thus, the statement at page 17 of the application that Alleghany "recently acquired control of the Central as the result of a proxy contest" is not true. Nor was the "slate of directors nominated by Alleghany," as there stated.

The proxy statement pursuant to which the 15 individual nominees solicited their proxies was designated as for the [fol. 545] "Alleghany-Young-Kirby-Ownership-Board of Directors," an open admission that at most Alleghany as then owner of 11,400 shares, was one of three separate sponsors of their election. Young and Kirby admittedly control Alleghany. It is obvious therefore that control of Central, if it exists to any extent in Alleghany, exists in the hands of Young and Kirby and to that extent has been acquired by them through Alleghany and not by Alleghany through them. This is true unless a constructive trust is

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* See Fortune Magazine, August 1954: "How Young got the Votes," p. 87.

** See Exhibit B to this amended petition, p. 2.

*** See Fortune Magazine, August, 1954, p. 87.

imposed on their and their 13 associates' personal stockholdings of Central and all rights and profits therein are judged to be held for the beneficial interest of Alleghany Corporation and its stockholders.*

When control of Central was acquired by the 15 directors on June 14, 1954, Alleghany had neither stock control nor board control through agreements by the 15 nominees as its constructive trustees.** It is thus not in control of Central in fact or in law and therefore is not a "necessary party" to the applications herein. It has no standing to file the present application, and no lawful right to carrier status under the Act.

[fol. 546] II. The Proposed Transactions Do Not Come Within the Scope of Section 5(3).

(a) Alleghany is not within the scope of 5(3)

Sec. 5(3) reads: "Wherever a person which is not a carrier is authorized, by an order entered under paragraph 2, to acquire control of any carrier or of two or more carriers," etc.

* A suit to compel this result has been filed in the United States District Court for the Southern District of New York. See Exhibit C to this amended petition.

Sec. 5(2) (a) (i) says it shall be lawful for "a person which is not a carrier to acquire control of two or more carriers . . . or for a person which is not a carrier [and

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** Alleghany did not even reveal in the proxy statement of the "Alleghany-Young-Kirby" nominees the extent of its Central stockholdings, as did the 15 nominees. This is a clear indication that the 15 nominees were not acting on behalf of Alleghany Corporation. Alleghany's legal role in the proxy contest was confined, as shown by the proxy statement to acting as "a clearinghouse and clerical headquarters" and to advancing "the interim costs of our solicitation for which it will be proportionately reimbursed by our nominees." (Exhibit B, p. 1) Thus the "Alleghany-Young-Kirby" nominees did not even have the costs of their election paid by Alleghany but borrowed the costs from it.

which has control of one or more carriers to acquire control of another carrier]. Although the bracketed words are omitted from Sections 5(3), it is obvious that these words are intended to qualify and identify what kind of "a person which is not a carrier" is meant by the language of Sec. 5(3).

The two subsections must be read together, not isolated. So read they make clear that the "person which is not a carrier" referred to in Sec. 5(3) is *either* a person which is not a carrier but which is asking for authority "to acquire control of two or more carriers" or "a person which is not a carrier *and which has control of one or more carriers*" and seeks "to acquire control of *another* carrier."

Alleghany, according to its counsel, is not in either category. If so, even assuming it does control Central, it does not come within the scope of Section 5(3).

(b) The transactions are not within the scope of 5(3)

The application by Alleghany is under Sec. 5(2) for approval of an "internal rearrangement of corporate struc- [fol. 547] ture" (p. 2, Alleghany reply to Gilbert petition). It is not to be authorized to "acquire control" of any carrier over which it does not already assert that it has lawful control. Therefore the proposed transaction does not come within the scope of Section 5(3), nor of the decision in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, or *Chesapeake & Ohio Railway Co. Purchase,* 261 ICC 239. In the latter case an "acquisition by Alleghany Corp. of control" of three carriers was sought and specifically authorized.* 261 ICC 239, 261-2. Here no such authorization is sought and indeed Alleghany counsel specifically negatived the intention in his letters to this Commission of December 15, 1954 and April 16, 1954:

> "The Congress did not deem the acquisition of a single railroad carrier system (by a person not a carrier or in control of a carrier) as a transaction within

* After an earlier acquisition of such control had been challenged as illegal by the proposed report in No. 29085. See 261 ICC at 240.

> the meaning of Section 5. . . . Furthermore, the Commission itself over a long period of years has so interpreted Section 5 insofar as railroad carriers are concerned." (Letter of April 16, 1954 by Burton K. Wheeler)
>
> "Just as Alleghany required no authority to take control of the Central System, it required no authority to continue control of the System." (Letter of December 15, 1954.)

Counsel, however, then endeavor to twist the meaning of the statute by alleging that the present application "specifically requests authority for Alleghany to control the L. & J. Bridge Company, through merger while continuing its control of New York Central. . . ." This overlooks that 5(3) applies only to applications "to acquire control" when such control has not previously and lawfully been acquired independently of the pending application and that what is actually asked here is only "an internal rearrange-[fol. 548] ment of corporate structure" without any new acquisition of control.

Counsel erroneously represent that it was C. & O.'s application for authority to purchase the properties of Norfolk & Terminal Transportation Co. that resulted in the imposition by this Commission of carrier status upon Alleghany under Section 5(3) of the Act. But this is not correct. There was also before the Commission an application for "acquisition by Alleghany of control" of the C. & O., Nickel Plate and Pere Marquette railroads, 261 ICC 239, 261-2. Here there is no application for control by the company and in fact specific disavowals by counsel of such intent.

It was "the *two* applications," 261 ICC at 260, that resulted in the Commission's finding that

> "such 'internal rearrangement of corporate structure' must have our approval under Section 5(2) of the Act or be unlawful. *Warrior & Gulf Nev. Co. Control*, 250 ICC 26, 28; *United Parcel Service of Portland—Purchase—Wiese*, 37 M.C.C. 374, 475, and *Atchison, T. & S. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M.C.C. 469, 471." 261 I.C.C. at 260, 261.

None of the cited cases, it should be noted, imposed carrier status upon the applicant where the applicant was a non-carrier.

Assuming, arguendo, therefore, that Alleghany is a proper and "necessary party" to the carrier applications herein because it controls Central (which we deny) and because of *Nicholas, Fayette & Greenbrier R. R. Co. Lease*, 261 I.C.C. 546, 547, this Commission can grant the present applications except insofar as Alleghany requests carrier status under 5(3). See *Warrior & Gulf Navigation Co., supra.*

[fol. 549] III. The S.E.C. order of October 4, 1945 and this Commission's order of June 5, 1945 became null and void on and after January 19, 1954, during which time Alleghany was required to register under the investment company act, or cease all business in Interstate Commerce.

(a) The Order of June 5, 1945

On June 5, 1945 this Commission approved and authorized in Finance Docket No. 14692 the acquisition by Alleghany Corporation of Control of the Chesapeake & Ohio Railway Company; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railroad Company and their subsidiaries and affiliates.

At no time thereafter has this Commission authorized Alleghany Corporation to acquire control of any other carriers.

Solely as a result of said authorization of June 5, 1945 the Alleghany Corporation was considered as a carrier by this Commission and became subject to regulation under the Interstate Commerce Act.

On January 19, 1954 the Alleghany Corporation divested itself of control of the Chesapeake & Ohio and its carrier affiliates and subsidiaries. Prior thereto Alleghany Corporation divested itself of control of the other carriers abovementioned.

As a result of said divestments the Alleghany Corporation, after January 19, 1954, was not lawfully subject to

regulation under the Interstate Commerce Act, nor was it in fact or law a carrier subject to any section of said Act. As a result of said divestments the order of June 5, 1945 automatically expired on January 19, 1954 and no longer had any legal force or effect.

[fol. 550] (b) The Order of October 4, 1945

The S.E.C. order of October 4, 1945 (20 S.E.C. 731) terminating Alleghany's registration under the Investment Company Act because it was then "subject to regulation under the Interstate Commerce Act" automatically became null and void on and after January 19, 1954 by reason of the facts above set forth.

Alleghany's failure to register with the S.E.C. under the Investment Company Act or otherwise to comply with that Act on and after January 19, 1954 was not in good faith since Alleghany knew and has admitted in these proceedings by letter of counsel dated January 28, 1954 that there was no longer any jurisdictional basis for the I.C.C. order of June 5, 1945.

Moreover the exemption provided in Section 3(9) of the Investment Company Act of "any company subject to regulation under the Interstate Commerce Act" should not be held to apply to Alleghany since the words "subject to regulation" properly construed mean "subject to the plenary regulation" of this Commission under the Interstate Commerce Act and not "subject to regulation only pursuant to Section 20(1) to (10) inclusive and Section 20a(2) to (11) inclusive."

(c) The Admissions of Alleghany's Counsel

That part of this Commission's order of June 5, 1945 holding "That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier, etc." became null and void after January 19, 1954 by reason of the facts above set forth.

These contentions have been admitted by Alleghany's counsel, on two occasions in the present proceedings: (1) [fol. 551] In their reply to and motion to dismiss the petition herein, they stated under date of January 17, 1955

that Alleghany is a "non-carrier," page 2, lines 5 and 6, and page 4, line 8; and (2) In their letter to this Commission dated January 28, 1954, they stated: "The conditions surrounding the authorization of Alleghany to control Chesapeake & Ohio depended upon continued control of Chesapeake & Ohio. They were co-extensive in time with such control and did not endure after Alleghany ceased to exercise the authority granted it by the Order. Etc." This position, they asserted, "is not only sound but is also quite beyond the possibility of controversy or dissent."

(d) That part of the June 5, 1945 order declaring Alleghany to be a carrier "unless and until otherwise ordered by this Commission" had no legal force or effect and became a nullity after January 19, 1954.

In its order of June 5, 1945 this Commission stated that "It is further ordered that unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier * * *." On the basis of this reservation of jurisdiction this Commission issued its Order to Show Cause dated June 22, 1954.

Obviously this issuance of the show cause order was no more than administrative courtesy, since the basis of the June 4, 1945 order had expired or ceased to exist after January 19, 1954.

A court cannot extend its statutory powers by judicial fiat. *Stoll* v. *Gottlieb,* 305 U. S. 165. The question of jurisdiction of the subject matter is not closed by the fact that there have been in the same case prior rulings of the same judge, or of another judge, sustaining the jurisdiction. *Sheldon* v. *Wabash R. Co.,* 105 F. 785. Where a court is [fol. 552] without jurisdiction in the particular case, its acts and proceedings can be of no force or validity and are a mere nullity and void. *Vallely* v. *Northern Fire & Marine Insurance Co.,* 254 U. S. 348; *Brogdex Co.* v. *Food Machinery Co.,* 92 F. 2d 787; *Great Lakes Dredge & Dock Co.* v. *Brown,* 47 F. 2d 265; *Northern Pacific S. S. Co.* v. *Industrial Accident Commission,* 23 F. 2d 109. And special jurisdictional acts cannot be enlarged by implication or intendment beyond the express letter of the grant. *Delaware Tribe of*

Indians v. *U. S.*; 84 Ct. of Claims 535; *Central Illinois Public Service Com.* v. *Industrial Com.*, 127 N.E. 80, 293 Ill. 62; *City Real Estate Co.* v. *Realty Const. Co.*, 167 Misc. (N. Y.) 379. Obviously, if judicial tribunals are without power to extend their own jurisdiction, quasi-judicial administrative tribunals such as this Commission could have no greater power.

There is nothing in the Interstate Commerce Act which gives this Commission jurisdiction over a former carrier after the stated facts on which jurisdiction was based, cease to exist.

It necessarily follows that this Commission's reservation of jurisdiction and any exercise of jurisdiction after January 19, 1954, over Alleghany Corporation is arbitrary and capricious, and without authority in law or fact.

Since the SEC memorandum of September 14, 1954, takes the same view as petitioner that Alleghany is no longer properly subject to ICC jurisdiction, it is obvious that its delay in acting pursuant to its duties under the Investment Company Act is merely because of an understandable reluctance to interfere with a coordinate administrative agency.

The fact that the SEC has postponed any action to revoke, suspend or modify its order of October 4, 1954 is [fol. 553] in no way a recognition that Alleghany is still lawfully a carrier subject to ICC jurisdiction. Hesitancy or delay in acting obviously is not the equivalent of final adjudication.

IV. The breaches of trust, violations of law, and fraudulent acts of Young & Kirby in their conduct of the affairs of Alleghany Corporation, make it impossible for this Commission to approve any application which would leave them in control of Alleghany or any carrier.

In a statement in support of its application for control of the Chesapeake & Ohio Railway Company, Finance Docket No. 14692, Alleghany represented that "the policies and performance of its present management with respect to the operation and management of the carriers concerned have all been consistent with the public interest as defined above, and that, in the light of the record, it should be found

that the continuance of the present relationships between Alleghany and these carriers is consistent with the public interest." (261 I.C.C. at 246)

Before this Commission made any such findings as urged by Alleghany, it took extensive evidence to determine whether they could be supported. Such a procedure would seem to be essential in the present case, in view of the fact that grave charges of impropriety, breaches of trust, violations of law and fraud are levied against Messrs. Young, Murchison & Richardson, in connection with their activities with respect to Alleghany and the New York Central and their acquisition of stock therein. Petitioner files herein, in this connection, his Complaint, in the United States District Court for the Southern District of New York, (See Exhibit C) and urges upon this Commission that it would be unseemly for it to act in the present matter before it has received evidence on these issues and heard the examination and cross-examination of the individuals above mentioned.

[fol. 554] Only after such evidence has been received by this Commission may it appropriately decide whether, if it has jurisdiction, it is in the public interest and the interest of Alleghany stockholders to approve the pending application of Alleghany, in any respect whatsoever or whether, as required by statute, it is necessary to impose as part of such approval just and reasonable terms and conditions.

Wherefore, your petitioner asks the Commission to dismiss the application of Alleghany Corporation. Oral argument is requested.

Respectfully submitted, Joseph B. Hyman, Attorney for Petitioner, 211 South Pitt Street, Alexandria, Virginia.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 555] EXHIBIT A TO AMENDED PETITION FOR LEAVE TO INTERVENE

[fol. 556] BEFORE THE INTERSTATE COMMERCE COMMISSION
Washington, D. C.

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Pocket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

STATE OF NEW YORK,
County of New York, ss.:

CARL S. BRESNICK, being duly sworn, deposes and says:

1. I am a member of the firm of Breswick & Co., and I make this affidavit in connection with the annexed petition of said firm for leave to intervene in the above entitled proceeding.

2. Breswick & Co. is a holder of common stock of Alleghany Corporation and first became a holder in October, 1946.

Carl S. Bresnick.

Sworn to before me this 11th day of February, 1955.
Sarah R. Morse, Notary Public, State of New York, No. 24-8031660. Qualified in Kings County. Certificate filed in New York County. Commission Expires March 30, 1956.

[fol. 557] EXHIBIT B TO AMENDED PETITION FOR LEAVE TO INTERVENE

[fol. 558] PROXY STATEMENT FOR THE PROPOSED ALLEGHANY-YOUNG-KIRBY OWNERSHIP BOARD OF DIRECTORS OF THE NEW YORK CENTRAL RAILROAD COMPANY

To the Stockholders of the New York Central Railroad Company:

Your proxy is respectfully solicited for the Annual Meeting of Stockholders of The New York Central Railroad Company to be held on Wednesday, May 26, 1954, at 12:00 noon, Eastern Daylight Saving Time, at the Armory, 195 Washington Ave., in the City of Albany, New York. Your present management has failed to answer our request for the record date of security holders entitled to vote at the meeting; such information is required to be stated in the Proxy Statement of your present management.

This solicitation is made on behalf of Alleghany Corporation and the fifteen nominees set forth on page 2 of this Proxy Statement. Its cost will be borne by Alleghany Corporation and the 15 nominees on the basis of their average holdings of New York Central stock during the year beginning May 26, 1954. Alleghany Corporation, of which Mr. Robert R. Young is Chairman and Mr. Allan P. Kirby is President, invests in railroad and other securities. It will furnish a clearing house and clerical headquarters and advance the interim costs of our solicitation, for which it will be proportionately reimbursed by our nominees. Whether Alleghany and the nominees will seek any reimbursement from the Central of all or any part of their solicitation expenses will be determined in the light of the results of the litigation instituted by Messrs. Young and Kirby against your present directors referred to in the accompanying Letter to Shareholders. Our solicitation will be made by mail, telephone, telegraph and personal solicitation; no professional solicitors have been engaged, nor is it anticipated that they will be.

Any person executing the enclosed proxy may revoke it at any time before it is exercised.

There are outstanding 6,447,410 shares of capital stock

each entitling the holder to one vote, of which the fifteen nominees own 1,089,880 shares.

The Alleghany-Young-Kirby nominees know of no matter other than the election of fifteen Directors and three Inspectors of Election to be presented at the Annual Meeting, except the proposals set forth hereafter.

Nominees for Election as Directors

Directors are to be elected to serve until their successors are elected at the next annual meeting. The proxies solicited herein will all be voted for the election of the Alleghany-Young-Kirby nominees as Directors. If any nominee shall become unavailable for election, these proxies will be voted for the election of a substitute approved by the other nominees. The nominees know of no circumstances likely to cause any of them to become unavailable. [fol. 559] The following table sets forth the relevant facts concerning each nominee.

Nominees and occupations*	Capital Stock of New York Central Railroad Beneficially Owned
William P. Feeley, Chicago, Ill..... President, Great Lakes Dredge and Dock Co.	100
R. Walter Graham, Jr., M.D., Baltimore, Md. ..... Surgeon; Medical Director of Maryland Hospital Services, Inc. (Blue Cross) and of Maryland Medical Services, Inc. (Blue Shield) since June, 1953.	41,800

* Unless otherwise indicated, occupations are as of the date of this letter and the five years previous.

Note 1. Mr. Daniel E. Taylor is a 48% stockholder, in West India Fruit and Steamship Co., Inc. which owns directly 29,000 shares and indirectly (through its wholly-owned subsidiary, Norfolk Warehouse Co., Inc.) 1,000 shares of stock in Central.

Allan P. Kirby, Morristown, N. J..... President Alleghany Corporation; Director of Chesapeake and Ohio Railway Co. until January 19, 1954	100,000
William H. Landers, Utica, N. Y..... Retired New York Central Engineer	80
Frederick Lewisohn, New York, N. Y... Member of New York Stock Exchange	9,600
Richard M. Moss, New York, N. Y..... Chairman and President, Clinton Foods, Inc.	10,000
Clinton W. Murchison, Dallas, Texas.. President, Delhi Oil Corp.	400,000
Eugene C. Pulliam, Indianapolis, Ind... Publisher, Indianapolis Star and Indianapolis News; President of various newspaper and radio enterprises	10,000
Sid W. Richardson, Fort Worth, Texas. Partner in Richardson & Bass (Oil and Gas development partnership)	400,000
Earl E. T. Smith, New York, N. Y..... Member of New York Stock Exchange; Financier	12,000
Daniel E. Taylor, Norfolk, Va. ..... President, West India Fruit & Steamship Co., Inc.	3,000 (See Note 1)
Orville Taylor, Chicago, Ill. ..... Attorney; Partner in Taylor, Miller, Busch & Magner	1,000
Andrew Van Pelt, Philadelphia, Penna. Director, Alleghany Corporation; Director of Chesapeake and Ohio Railway Co. until Jan. 19, 1954	2,000
Lila Bell Acheson Wallace, Pleasantville, N. Y..... Editor and Co-owner, The Reader's Digest	100
Robert R. Young, New York, N. Y..... Chairman, Alleghany Corporation; Chairman of Chesapeake and Ohio Railway Co. until Jan. 19, 1954	100,200

[fol. 560] **Alleghany's Acquisition Program**

Alleghany, which has sold all of its Chesapeake and Ohio Railway Company stock, intends to acquire Central stock from time to time. It holds short-term notes of Mr. Murchison and Mr. Richardson totalling $7,500,000 due September 15, 1954 and bearing 4½% interest, the proceeds of which, together with temporary borrowings of $5,000,000 from Mr. Kirby and $7,500,000 from a group of banks, were applied by Mr. Murchison and Mr. Richardson to their purchase of their 800,000 shares of Central. They have the right to require Alleghany, at their several options, to purchase from them up to a total of 400,000 of such shares, but only between July 15 and September 15, 1954, at $25 per share. If they exercise in whole or in part such options covering 200,000 of their shares, they must also contribute an equal number of shares, which, with the shares so purchased by Alleghany, must be subjected to joint venture agreements with Alleghany under which, in effect, Alleghany will provide the capital, will be entitled to half of all income and profits and will be guaranteed by such other parties against losses. Mr. Richardson also has the right to require Mr. Kirby to purchase from him 200,000 additional shares of Central stock at $25 per share between June 1-10 and July 11-15, 1954.

There is no understanding with or determination by Mr. Murchison or Mr. Richardson as to whether either or both will exercise any or all such rights to require purchase of these shares of Central stock presently owned by them. If Alleghany shall not acquire interests in Central stock through the exercise of these options by Mr. Murchison and Mr. Richardson, it intends otherwise to acquire stock of Central with the proceeds from the payment of such notes it holds from Mr. Murchison and Mr. Richardson, or from other funds available to it. This, of course, does not constitute a representation by Alleghany that it will purchase in the market any given amount of Central stock at any given time or price.

Other Matters

The Company's charter limits the Board of Directors to fifteen. When your new Board elects its first President it

will be understood with him that he will fill the first vacancy on the Board and that, in the meantime, he will be expected to attend all meetings of the Board and any Committee of the Board.

We have been informed that at the annual meeting other stockholders will propose two resolutions (a) requesting the directors to submit to stockholders at a future meeting an amendment to the Articles of Incorporation of the Company to provide for Cumulative Voting in elections of directors in 1955 or thereafter, and (b) changing the date of the annual meeting, all as set forth in the Proxy Statement of the present management.

The proxies solicited here in will be voted for or against these Resolutions only as you instruct us on the proxy form in the place indicated.

[fol. 561] None of the nominees nor their associates had any material interest, direct or indirect, in any material transactions of the New York Central Railroad Company during the last twelve months or in any material proposed transactions of said Company or its subsidiaries, except that the Chesapeake and Ohio Railway Company of which Robert R. Young, Allan P. Kirby and Andrew Van Pelt were directors until January 19, 1954, had dealings with the Company in the normal course of railroad business.

It is not intended that any of our nominees, if elected, will be employed by the Central, with the exception of Robert R. Young, who has agreed to serve as Chairman of the Board, but not as principal operating officer, at a salary of $1 per year.

Inspectors of Election

Article 1 of the By-Laws provides that at the Annual Meeting of Stockholders there shall be elected three Inspectors of Election. The Alleghany-Young-Kirby nominees will vote for the election of Russell Briscoe, Andrew V. Clements and James P. Guinane. If any of these persons shall become unavailable the Alleghany-Young-Kirby nominees shall appoint a substitute.

Execution of the Proxy Form

Please sign the proxy form at once and return it in the enclosed envelope. No stamp is required.

Alleghany-Young-Kirby Ownership Board, by Robert R. Young

Dated: April 8, 1954.

[fol. 562] [File endorsement omitted]

INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

REPLY OF ALLEGHANY TO AND REQUEST FOR DENIAL OF AMENDED PETITION FOR LEAVE TO INTERVENE OF BRESWICK & COMPANY—Filed February 24, 1955.

Applicant Alleghany respectfully urges that the Amended Petition for Leave to Intervene of Breswick & Company be forthwith denied.

On February 15, 1955, the Commission (Division 4) entered its Order herein denying a Petition for Leave to Intervene filed by Breswick & Company. The grounds for denial of that petition were contained in the recital clauses of the Commission's Order which, among other things, set forth (1) that Petitioner failed to show how its interests pertained to the issues presented by the application or differed from the interests of all other holders of the same classes of stock of Alleghany and Central, and (2) that Petitioner sought to inject collateral issues with a consequent broadening of the matters actually presented by the applicants herein.

[fol. 563] The present Amended Petition makes no pre-

tense of meeting these grounds assigned by the Commission in denying its initial petition. Instead, Petitioner seeks even further to broaden the issues of these proceedings, while continuing its silence on its interest in these proceedings and without making any effort to show how they differ from the interests of other stockholders. Petitioner even reargues *in haec verba* matters which this Commission specifically rejected. For example, Point III in its Amended Petition is admittedly a verbatim extract from its initial petition, plus the addition of such afterthoughts as have since come to it. Petitioner's Point III ("The SEC Order of October 4, 1945 and this Commission's Order of June 5, 1945 became null and void on and after January 19, 1954 . . .") was flatly rejected by the Commission's Order (" . . . the Commission has entered no order changing or modifying the order of June 5, 1945 . . . and Alleghany's status as a carrier . . . will remain in force and effect pending final determination of the proceedings instigated by the Commission . . .").

Under these circumstances, the Amended Petition is not entitled to consideration. It is abusive, and even contemptuous, of the Commission's processes to file an Amended Petition for Leave to Intervene which fails to reflect any concern with the Order released by the Commission in denying its prior petition. The Amended Petition is clearly debarred by Rule 101 of the Commission's General Rules of Practice.

To the extent there is any new matter in the Amended Petition, it consists in the assertion (Point I) that Alle- [fol. 564] ghany is not in control, legally or factually, of New York Central. This assertion, first be it noted, is in flat contradiction of the repeated assertions of Petitioner in its initial petition.* This willingness to make contradictory assertions—apparent here and elsewhere—fortifies Alleghany's belief, unambiguously stated in the first para-

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* E.g., "Alleghany Corporation and its nominees—by stock purchases and the solicitation of proxies and other acts—sought to acquire and did acquire control of the applicant railroad and bridge companies herein" (Initial Petition, p. 3).

graph of its Reply to the initial petition, and nowhere denied, that Petitioner's desire to intervene is merely the reflecton of an intent to harrass Alleghany, probably by a disgruntled former employee.

The assertion that Alleghany does not now control Central is so contrary to the well-known and highly-publicized fact that it requires no answer. The notion that it is Alleghany's officers, and not Alleghany, which control Central is mere semantics without substance. If this notion has validity, then it would seem to follow that Alleghany is now entirely free to acquire control of a carrier—say, the Pennsylvania—in that it is its officers, not Alleghany, which control New York Central.

Respectfully submitted, Alleghany Corporation, By (S.) Edward K. Wheeler, Its Attorney.

February 24, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 565] Certificate of Service (Omitted in printing)

[fol. 566] Before the Interstate Commerce Commission, Division 4

Finance Docket No. 14692

Chesapeake & Ohio Railway Company Purchase, Etc.

Finance Docket No. 18656

Louisville & Jeffersonville Bridge and Railroad Company Merger, Etc.

Order Dismissing Amended Breswick & Co. Petition—March 2, 1955

It appearing, That on September 20, 1954, an application was filed by (1) The Cleveland, Cincinnati, Chicago and St. Louis Railway Company (Big Four) and the Louisville

& Jeffersonville Bridge and Railroad Company (bridge company) to merge their properties and franchises, (2) the Big Four, as lessor, and The New York Central Railroad Company (Central), as lessee, to modify the provisions of their lease of January 2, 1930, to include the properties of the bridge company, (3) Central and Alleghany Corporation to acquire, in view of the latter's control of Central and Central's control of the Big Four, control of the properties and franchises of the bridge company; and requesting an order of this Commission containing, among other things, a provision that Alleghany Corporation (Alleghany) shall continue to be considered a carrier subject to the provisions of section 20(1) to (10), inclusive, and 20a(2) to (11), inclusive, of the Interstate Commerce Act, as previously provided, (unless and until otherwise ordered by this Commission) in our order of June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239, in which we retained jurisdiction to make such further order or modification of the order as might thereafter be necessary or appropriate.

It further appearing, That on February 4, 1955, Breswick & Company, a stockholder in Alleghany filed a petition for leave to intervene in the above-entitled proceedings and to submit motions to dismiss the application in Finance Docket No. 18656, or, in the alternative, to deny it as to Alleghany; that Alleghany filed its reply on February 10, 1955; and that after consideration thereof, the said petition was denied by the Commission, by division 4, by order of February 15, 1955.

It further appearing, That the petitioner on February 21, 1955, filed an amended petition for leave to intervene, alleging new grounds to justify its participation and its filing of a motion to dismiss the application of Alleghany for lack of jurisdiction, inasmuch as Alleghany presently is not a carrier subject to our jurisdiction, and therefore the proposed transactions are not within the scope of section 5(3) of the act.

It further appearing, That Alleghany filed a reply to the amended petition on February 24, 1955, asserting that the amended petition is filed solely to further harrass Alle- [fol. 567] ghany and Central; that it renews contentions

rejected by us in the order herein of February 15, 1955; and that it should be denied.

And it further appearing, That the original petition for leave to intervene was denied February 15, 1955, and therefore no pleading was pending for disposition on February 21, 1955, the date the amended petition was filed.

It is ordered, That the amended petition for leave to intervene, filed by Breswick & Company on February 21, 1955, be, and it is hereby, dismissed.

By the Commission, division 4.

Harold D. McCoy, Secretary.

[fol. 568] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18656[1]

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Report and Order

Submitted February 24, 1955

Decided March 2, 1955.

1. (a) Merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation; and

(b) Modification of the lease of January 2, 1930, under which the New York Central Railroad Company, lessee,

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[1] Also embraces Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc. Previous reports, 261 I.C.C. 239, and 271 I.C.C. 5.

operates the property of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, lessor, to give effect to the merger described in (a) above, approved and authorized. Conditions prescribed.

2. Alleghany Corporation subjected to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

3. Effective portions of the order of June 5, 1945, in Finance Docket No. 14692, terminated and of no further force and effect.

4. Jurisdiction retained to make such further order or orders as hereafter may be necessary or appropriate.

Harold H. McLean, Burton K. Wheeler, and *Edward K. Wheeler* for applicants.

William H. Timbers for the United States Securities and Exchange Commission, intervener for limited purpose.

[fol. 569] REPORT OF THE COMMISSION

Division 4, Commissioners Johnson, Mitchell, and Cross by Division 4:

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Louisville & Jeffersonville Bridge and Railroad Company, The New York Central Railroad Company, and the Alleghany Corporation, hereinafter referred to as Big Four, Jeffersonville, Central, and Alleghany, respectively, on September 20, 1954, jointly applied under section 5(2) of the Interstate Commerce Act, as amended, herein sometimes called the Act, for approval and authorization of (1) (a) merger of the properties and franchises of the Jeffersonville into the Big Four for ownership, management, and operation; and (b) modification of the lease of January 2, 1930, under which Central, as lessee, operates the property of Big Four, lessor, to give effect to the acquisition of additional property pursuant to the proposed merger of Jeffersonville into Big Four; (2) acquisition by Central and Allephany, by virtue of their control of Big Four, of control of the properties of Jeffersonville; and (3) continuation of Alleghany's status as a carrier subject to the provisions of section 20(1) to (10), in-

clusive, and 20a(2) to (11), inclusive, of the Act, as provided by section 5(3) thereof. Alleghany filed a supplemental application on December 6, 1954.

Pursuant to its petition received September 28, 1954, and a supplemental petition dated December 14, 1954, the Securities and Exchange Commission, herein referred to as S. E. C., was permitted to intervene in this proceeding for the limited purpose of filing its memorandum of September 14, 1954, and the supplement thereto, in opposition to continuation by us of Alleghany's status as a carrier subject to the Act.

Petitions for leave to intervene in the proceedings herein were filed with us by so-called "independent directors" of the Missouri Pacific Railroad Company, by Lewis D. Gilbert and John Gilbert, and Breswick & Company, so-called independent investors and stockholders in Alleghany Corporation and the New York Central Railroad Company. Leave to intervene was not granted and the petitions were denied.

No other protest to the application has been received, and no representations have been made by any State authorities. We are of the opinion that a public hearing is not necessary in the public interest for the reason that the proposed merger will simplify the corporate organization of Big Four, and that the related proposed transactions, subject to the terms and conditions specified herein, will not adversely affect transportation service available to the public.

The New York Central Railroad Company.—Central is the parent company of the New York Central Railroad system. It was organized under the laws of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan following the consolidation of the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, and others, under an agreement of April 29, 1914, and pursuant to our order of June [fol. 570] 18, 1952, in Finance Docket No. 17700, *New York Central R. Co. Merger,* 282 I.C.C. 813 (not printed in full), merged into itself certain wholly-owned and controlled subsidiary carriers. Its corporate history and other pertinent information are contained in Finance Docket No.

5690, *New York Central Unification*, 150 I.C.C. 278, 154 I.C.C. 489. For purposes of identification, the carriers related to the Central system, as of June 30, 1954, are listed in the appendix attached hereto.

The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice-president of Alleghany holds a similar position with Central.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.—Big Four was organized under the laws of Ohio and Indiana, following the consolidation of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, and the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company under an agreement of March 19, 1889, and pursuant to our order of June 17, 1938, *Cleveland, C. C. & St. L. Ry. Co. Merger*, 228 I.C.C. 240, merged into itself certain other companies which it controlled. It owns and leases lines of railroad in Ohio, Indiana, Illinois, and Michigan and has trackage rights over 2.12 miles of line in Kentucky, and 8.18 miles in Missouri. It was an operating carrier until February 1, 1930, since which time Central has operated it as lessee under an agreement of January 2, 1930, authorized pursuant to conditions contained in *New York Central Unification, supra.* Central owns 465,514 shares of the common stock of Big Four, and 86,436 shares of its preferred stock, constituting 98.98 percent of the common, and 86.45 percent of the preferred stock out-

standing. In addition to the control of Jeffersonville, explained below, Big Four and Central by stock ownership or lease also control the Peoria & Eastern Railway Company and the properties of the Central Railroad Company of Indianapolis.

The Louisville & Jeffersonville Bridge & Railroad Company.—Jeffersonville was organized pursuant to a consolidation agreement dated April 25, 1890, between separate companies named the Louisville & Jeffersonville Bridge Company, organized in Kentucky and Indiana. It now exists under laws of those States, and its physical properties are located therein. The capital stock of Jeffersonville is owned by Big Four, and held by Central under lease. Alleghany states that with Central, it indirectly controls Jeffersonville through the Big Four.

[fol. 571] *The Alleghany Corporation.*—Alleghany was incorporated in Maryland in 1929, under a charter providing broad powers to engage in any lawful business. Since its creation, it has been in the investment business dealing in corporate securities including those of railroad companies subject to the Act. Subject to certain conditions in our order of June 5, 1945, Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239, hereinafter referred to as the *Chesapeake case,* among other things, Alleghany was authorized, through ownership of stock, to acquire control of the Chesapeake & Ohio Railway Company, herein called Chesapeake; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railway Company, and their respective subsidiaries and affiliates, herein together referred to as the Chesapeake system. That proceeding arose in connection with the purchase by Chesapeake of the properties of the Norfolk Terminal & Transportation Company, the capital stock of which was owned, and the properties of which theretofore had been operated under lease, by Chesapeake.

The report in the *Chesapeake case* shows that in addition to the stock of the Chesapeake system owned by Alleghany, it also then owned stock of other carriers subject to the Act, not affiliated with Chesapeake or its system. Among those securities, it owned considerable stock of the Missouri Pacific Railroad Company, the control of which

was vested in a trustee subject to the jurisdiction of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in a pending reorganization under section 77 of the Bankruptcy Act; 46,700 shares of Erie Railroad Company common stock; and 248,120 shares of common and 29,190 shares of preferred stock of the Pittston Company, which owns all the outstanding stock of the United States Trucking Corporation, a motor carrier subject to part II of the Act. Chesapeake owned 190,625 shares of common and 22,426 of preferred stock of the Pittston Company, of whose 10 directors, 2 also served as directors of Chesapeake and 1 as director of New York, Chicago & St. Louis Railroad Company.

The order of June 5, 1945, referred to in the preceding paragraph, among other things, also held that Alleghany should be considered as a carrier subject to section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Act. It also provided for the creation of separate voting trust agreements into which Alleghany and Chesapeake were ordered to deposit their respective holdings of the Pittston Company's stock, and the owned or after-acquired stock of any carrier not related to the Chesapeake system, and to eliminate and avoid any interlocking directorates between carriers whose stocks are so trusteed and the Alleghany or the Chesapeake system. In view of our action subjecting Alleghany to certain provisions of the Act, the S. E. C., under the Investment Company Act of 1940, herein called the investment act, on October 4, 1945, terminated the registration of Alleghany as a closed-end nondiversified management investment company, subject to the proviso that, if and when Alleghany ceases to be considered as a carrier subject to the Interstate Commerce Act, the order of exemption from registration as an investment company might be revoked, suspended, or modified. In its quarterly report of securities held under the [fol. 572] trusts, which Alleghany was required to file according to the order in the *Chesapeake case*, we were advised that as of the end of September 1954, Alleghany had no securities on deposit in either of the voting trusts which we required to be set up. In the application herein, Alleghany states it has no intercorporate relationships with car-

riers subject to the Act, except the ownership of securities of carriers of the Central system, which Alleghany alleges it controls (and stock of the Missouri Pacific Railroad Company, debtor in reorganization).

Alleghany states it now is operating under a policy of simplifying Central's corporate organization, and from time to time will apply for authority to change the internal structure thereof by mergers, consolidations, leases, and/or other acquisitions of properties. In a related proceeding to be discussed subsequently herein, Alleghany showed that its investments as of October 14, 1954, included rail securities 52 percent, nonrail securities 15 percent, cash and U. S. Treasury bills 6 percent, and notes receivable 27 percent. In the supplement herein filed December 6, 1954, it shows that as of the close of business November 30, 1954, its portfolio, at cost, totaled $70,855,069, invested in rail securities to the extent of 67.76 percent, nonrail 7.78 percent, cash 0.44 percent, and notes receivable 24.02 percent. In a subsequent pleading herein, Alleghany states that as of December 31, 1954, its nonrail investments, at cost, constituted only 6.45 percent of its portfolio. Under present plans, excluding Government bonds, Alleghany asserts that it expects to maintain in rail securities not less than 75 percent of its portfolio.

Prior Proceedings related hereto.—The events and transactions which ostensibly terminated the power of Alleghany to control the Chesapeake system, and vested it with power to control the Central system gave rise to several petitions and requests which were instituted before the present application was filed. In the order of their receipt the earlier procedings were as follows:

A petition received March 2, 1954, and supplemented March 12, 1954, was filed by Central, requesting us, upon our own motion, to investigate the transactions of Alleghany and Chesapeake to determine (a) if Alleghany, directly or indirectly, continues to control Chesapeake; (b) if the purported sale of 800,000 shares of Central stock by Chesapeake to Clinton W. Murchison and Sid W. Richardson in February 1954, was in compliance with the terms of the trust agreement under which Alleghany deposited the Central stock as required in the order of June 5, 1945;

(c) if Alleghany owns or holds the voting stock of any carrier corporations which should have been, but were not placed in trust under the conditions referred to in (b) hereinabove, and (d) if the Clayton Anti-Trust Act had been violated by Chesapeake through acquisition by it of the 800,000 shares of Central stock referred to in (b)..

Inquiries by our representatives disclosed no reasonable evidence upon which to question the validity or the effect of Alleghany's divesting itself of the stock of, and representation on the board of directors of Chesapeake; of the [fol. 573] sale of Central's stock held for Chesapeake in trust, to persons not directors or employees of Alleghany; or of the further acts to eliminate all interrelationships between Chesapeake and Alleghany. By order of April 6, 1954, the Commission found that the information so far developed, did not comprise sufficient grounds for the institution of the investigation requested, and denied the request, specifically stating that the action did not constitute a determination of the propriety or legality of any acquisition of control of Central or the Central system or of any interlocking directorates in connection therewith.

On April 6, 1954, a proceeding assigned Docket No. 31535, was filed by Central in the form of a petition under section 5(d) of the Administrative Procedure Act, for a declaratory order ruling the acquisition of Central's stock by or for Alleghany, and the announced and prospective plans by Alleghany and Robert R. Young, chairman of its board of directors, and Allan P. Kirby, its president, to control Central and the carriers of its system, would constitute the acquisition of control of more than one carrier subject to the Act, in violation of its section 5(4), unless approved by us upon an appropriate application. The petition was supplemented April 13, 1954, and was joined in on April 22, 1954, by Harold S. Vanderbilt, a director of Central and owner of 60,000 shares of its stock. By order of May 11, 1954, a protective committee for several of the leased lines of Central and their bondholders was permitted to intervene.

Alleghany replied on April 16, 1954, and denied that the election and seating of its nominees on the board of directors of Central would constitute the control of two or more

carriers in a common interest as prohibited in section 5(2) of the Act. It argued that any declaratory order as requested would interfere with the stockholders' right to select its management. Oral argument was heard by the Commission, and, on May 18, 1954, in the exercise of its discretion, the Commission denied the petition on the grounds that to do otherwise would not advance justice.

On May 7, 1954, the individuals comprising the protective committee of Central's leased lines and bondholder creditors, who on that date also intervened in Docket No. 31535, mentioned above, filed a complaint under section 5(7) of the Act, assigned Docket No. 31530. The complainants alleged that Alleghany and Chesapeake, with Young, Kirby, Richardson, Murchison, and Cyrus S. Eaton, chairman of the board of directors of Chesapeake, were participating in accomplishing or effectuating the power to manage Central and Chesapeake in a common interest, and have such power; that Alleghany together with the individual defendants, through ownership or control of voting power of over 1,000,000 shares (more than 17 percent) of Central's outstanding stock, had acquired the power to control Central and two of its principal affiliated carriers. The complainants requested a hearing and investigation of the defendants leading to an order that they desist from the complained of violations of section 5(4). On May 13, 1954, Central was permitted to intervene. Answers and motions to dismiss were filed separately by Chesapeake and Eaton, by Murchison and Richardson, and by Alleghany, Young, and Kirby, and on June 11, 1954, the complainants and Central filed replies to the motions to [fol. 574] dismiss. On August 12, 1954, the complainants petitioned for leave to withdraw the complaint in view of the pleadings entered by Alleghany in reply to the order to show cause issued by us in Finance Docket No. 14692, and by letter dated August 17, 1954, Central asked leave to withdraw its petition for intervention. An order was entered vacating and setting aside the order of May 13, 1954, and dismissing the complaint of the protective committee and the petition of Central.

During the interval that the foregoing petitions and complaint were pending, attorneys and officials of Alle-

ghany and Chesapeake asserted several times that Alleghany had disposed of its holdings of Chesapeake stock, and had taken various positive steps to divest itself of control of the Chesapeake system. In that circumstance, by order of June 22, 1954, we requested Alleghany to show cause on or before July 15, 1954, why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applies to and provides that Alleghany shall be considered as a carrier subject to certain portions of the Act, unless and until otherwise ordered. On June 29, 1954, Alleghany requested that we postpone any determination of withdrawal of Alleghany's status as a carrier under the Act, and that it be permitted until October 1, 1954, to respond to this aspect of the show cause order. We denied that request.

On July 14, 1954, Alleghany responded to the order to show cause and stated it would be ready at a proper time to accept an order terminating its control of Chesapeake, and requested that action regarding Alleghany's status as a carrier be withheld until Central Alleghany, Big Four, and Jeffersonville complete preparation of, and file an application under section 5(2) for authority, among other things, to merge the properties of the latter two, and through control of Big Four, for the first two to control the properties of Jeffersonville. For the reason that the relationship of Alleghany to Central and the other carriers, in connection with the proposed transactions was alleged to be almost exactly parallel to Alleghany's relationship to Chesapeake at the time the *Chesapeake case* was determined, Alleghany urged that approval of the new application would require continuation of its status as a carrier subject to the Act. On July 23, 1954, we ordered action on the show cause withheld for 60 days to permit the filing of the joint application.

Jurisdiction under the Interstate Commerce Act.—Section 5(2)(a) of the Act, among other things, provides that it shall be lawful, with approval and authorization of this Commission, as provided in subdivision (b) thereof, for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire

control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has no control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Section 5(2)(b), among other things, provides that when a transaction is proposed under subparagraph (a) the carrier or carriers or per- [fol. 575] sons seeking authority thereunder shall present an application to the Commission, and if it finds the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, the Commission shall enter an order approving and authorizing the transaction, subject to such terms and conditions and such modifications found to be just and reasonable. Our jurisdiction to approve and authorize control by Alleghany of Central and its related carriers, or of the properties of Central or its system carriers, must depend upon whether Alleghany is a carrier or a person as described in section 5(2), and whether the proposed transaction is within the scope of subparagraph (a).

The decision in the *Chesapeake case,* subject to certain conditions, among other things, announced that unless and until otherwise ordered, Alleghany shall be considered as a carrier subject to the provisions of the Act relating to reports, accounts, etc., and the issues of securities and assumptions of liability of carriers, to the same extent that those provisions are applicable to Chesapeake and its carrier subsidiaries and affiliates. Without our further order, the voluntary action of Alleghany on and after January 19, 1954, divesting itself of its stockholdings and control of Chesapeake, and removing from deposit in the voting trust agreements, the controlling holdings of other carriers' stocks and disposing of such holdings, could not operate to alter the status of Alleghany as a carrier subject to the Act.

The foregoing analysis is premised upon the theory that Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change. To find otherwise would disregard the language of the report and order in the *Chesapeake case.* We believe the situation, so far as our jurisdiction is concerned,

would be no different had Alleghany ceased to be a carrier subject to the Act at some time prior to the election by the stockholders of Central of the slate of nominees proposed by Alleghany. Under those circumstances, it would [fol. 576] have been a person not a carrier under the Act, and our jurisdiction over its acquisition of control of Central and its subsidiaries would attach under section 5(2)(a), only if it involved two or more carriers subject to the Act. The failure of Alleghany to request authorization specifically to control these carriers would make the application under consideration incomplete, and we would be obliged to limit our authorization accordingly.

The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of two or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization.[2] That principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary.

During and following the argument before the Commission on May 14, 1954, in Docket No. 31535, counsel for Alleghany contended that the acquisition by Alleghany of stock of Central, and the election of directors of Central as proposed by Alleghany, would not result in the effectuation of control of two or more carriers in a common interest within the meaning of section 5(2) of the Act. This, they

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[2] For example, see *Seaboard Air Line Ry. Co. Receivership*, 261 I.C.C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I.C.C. 801, not printed in full. *Arkansas & L. M. Ry. Co. Control*, 282 I.C.C. 254, 260. *Weinstein—Control—Capital Transit Co. and Montgomery*, 56 M.C.C. 127, 131. *Stoughton—Control—Delaware Coach Co.*, 57 M.C.C. 456. *Kittrell—Control—Dixie Motor Coach Corp.*, 37 M.C.C. 91.

premise on the theory that Central and its related carriers constitute a single carrier already in existence as a system, control of which Alleghany may lawfully acquire without our specific authorization.

In Docket No. 31535, hereinbefore reviewed, the Commission in its discretion, on May 18, 1954, entered its order refusing the request for a declaratory order. The Commission did not specify in that order whether the nature of the relief sought was not appropriate, or whether the facts alleged in support thereof had been found not to merit the relief requested. The order cannot be considered any indication of a conclusion by the Commission that the Central system is or is not more than one carrier under the terms of section 5 of the Act. Actually, the order of May 18, 1954, constitutes only a denial of the request for a declaratory order.

In what appears to be an inconsistency, Alleghany's counsel also argued that because Alleghany (a noncarrier [fol. 577] railroad holding company), has control of a major railroad system, it should continue to be considered as a carrier subject to our jurisdiction. That conclusion could be justified under the Act, only on the grounds that Alleghany controls more than one carrier subject to the Act.

Among its other arguments, Alleghany's suggestion that a decision contrary to its views would result in requiring approval by us whenever a board of directors of a carrier corporation is replaced by the stockholders' election, also is untenable. To reason thus ignores the distinction between election of individuals as directors and control of the board of directors. The latter situation seems to have arisen when Alleghany, through the ownership of stock and the naming of a board of directors of its own choosing or otherwise, assured itself of control of the board of directors of Central and its related carriers. As a consequence, a holding company and those in control thereof, admittedly acquired control of a carrier which controls subsidiary carriers. In our opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest.

In coming before us for authorization, Alleghany must be understood to have decided that it is either a carrier which has acquired control of one or more carriers through ownership of its stock or otherwise, or a person which is not a carrier which has acquired control of two or more carriers through ownership of their stock or otherwise. These conditions of status are exclusive of each other and cannot simultaneously characterize an individual or an entity. Therefore, for purposes of determining our jurisdiction in this proceeding, it is unnecessary to determine which of the two personalities applies to Alleghany.

Scope of authorization involved.—The applicants herein contend that the existing relationship between Alleghany and the Central system, in all material respects, is identical to the relationship existing in 1945 between Alleghany and the Chesapeake system. However, unlike the request in the *Chesapeake case,* the authority now requested involves only our approval of the proposed change in the manner of control of the properties and franchises of Jeffersonville. Central and Alleghany are said to join as applicants solely because the proposed transaction will change the control of Jeffersonville's properties through stock ownership, to control through merger. The application in the *Chesapeake case* differed from the present application in that the earlier request as supplemented, showed that Alleghany then controlled carriers subject to the Act in addition to those included in the Chesapeake system, and differs also in that Alleghany at that time requested our authorization to control Chesapeake and its related carriers, and to change the manner of control of a carrier subsidiary to Chesapeake.

The present application is filed on the theory that the internal rearrangements of the applicants' corporate [fol. 578] structure require the filing of an application, as determined by the Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, and by us in *Nicholas, Fayette & Greenbrier R. Co. Lease,* 261 I.C.C. 546, and other cases. The supplement to the present application, filed December 6, 1954, repeats statements by Alleghany that it controls Central and its related carriers, and by letter dated December 15, 1954, counsel for Alleghany

emphasizes that the supplemental application was filed only to supply information to aid our determination of the proposed merger and the continuation of Alleghany's status as a carrier under section 5 of the Act. Alleghany's intention is clearly shown as not to include a request for authority to control Central and the carriers of its system. Alleghany was stated to be of the opinion that the request to control Jeffersonville through merger, while continuing control of Central and its subsidiaries (obtained by Alleghany in June 1954 as a result of a proxy contest) fully complied with the requirements upon Alleghany under section 5 of the Act. Further, Alleghany contends that the application as amended complies with section 5(3), and requires that Alleghany's status as a carrier be continued.

Undoubtedly, the application herein was prepared and presented according to the applicants' best interpretation of requirements under section 5 of the Act. To the extent that the applicants propose specific changes of aspects of control of carriers and their properties, we will examine its contents on the merits. If we find that the proposed transactions, as part of Alleghany's program, are within the scope of subparagraph (a), and that they will be consistent with the public interest, we will grant the application. Of course, our order of approval and authorization will be entered subject to whatever terms, conditions, and modifications we deem just and reasonable.

Position of the Securities and Exchange Commission.—On September 24, 1954, S.E.C. was permitted to intervene in the show cause proceeding in Finance Docket No. 14692, for the limited purpose of filing therein a memorandum dated September 14, 1954, suggesting that we terminate our order of June 5, 1945, insofar as it finds Alleghany to be as a carrier subject to specified provisions of the Act, and that we decline to enter any new order having the same effect. As shown previously, the S.E.C. intervened to the same extent in the application under consideration herein. S.E.C., on July 7, 1954, instituted a proceeding, its file No. 811,338, to determine whether its order of October 4, 1945, should be revoked, suspended or modified in view of Alleghany having divested itself of control of Chesa-

peake. By order of October 18, 1954, the S.E.C. postponed further action therein pending any revocation, modification, or suspension by us of the order of June 5, 1945, in the *Chesapeake case.*

The memorandum shows that on November 1, 1940, Alleghany registered under the investment act as a closed-end non-diversified management investment company; that at the end of 1940, it had total assets valued at $96,553,000, of which more than 95 percent was in railroad and allied [fol. 579] securities (including, at market value, $80,000,000 in Chesapeake); that prior to October 4, 1945, Alleghany's railroad securities (including about 38 percent in Chesapeake) totaled $83,000,000, or 86 percent of its total assets; and that Alleghany controlled Chesapeake by ownership of about 600,000 shares of its common stock. In contrast, Alleghany's financial statements of July 31, 1954, are said to show that Alleghany sold its remaining 104,854 shares of Chesapeake stock for $3,600,000; that it had $7,500,000 invested in common stock of Central, and $7,500,000 in notes receivable under joint venture agreements covering additional shares of Central stock; that only about 16 percent of Alleghany's $67,000,000 assets are invested in railroad stock; and that about 24 percent or $16,000,000 is invested in Investors Diversified Services, herein referred to as I. D. S., of whose voting power Alleghany owns 70 percent. I. D. S. is an investment company controlling other investment companies. It has assets of $257,000,000, and owns, manages, or sponsors three face-amount certificate investment companies, and four open-end investment companies with combined assets of over one billion dollars. Based on the foregoing developments since 1945, the S. E. C. concludes that Alleghany's investment portfolio has practically reversed itself, and that Alleghany no longer should be deemed a carrier subject to the Interstate Commerce Act, but as an investment company subject to regulation under the investment act.

The S.E.C. contends that Alleghany is an "investment company" because it is engaged primarily in the business of investing, reinvesting, or trading in securities within the meaning of section 3(a)(1) of the investment act. In

proof thereof, S. E. C. submits the number of issues of securities held by Alleghany at the end of each year from 1945 through 1953 (ranging from 66 in 1945 to 20 in 1948 and 1949); the number of issues purchased and sold during those years (ranging from 8 purchases in 1948, and 5 sales in 1945 and 1952, to 27 purchases in 1946, and 28 sales in 1953), and annual expenditures of from $5,776,547 to $26,572,116, and proceeds of from $770,423 to $32,455,608. The S.E.C. also asserts that if there is doubt of the activities of Alleghany, its owning or holding of the securities of Chesapeake and I. D. S. for substantial periods gave those holdings the characteristics of "investment securities" as defined in section 3(a)(3), even though Alleghany had control of those companies.

The S. E. C. states that annual reports and other information filed with it after October 4, 1945, disclose a number of transactions involving Alleghany, which would have required prior approval or exemption under the investment act, or might have been prohibited, if Alleghany's registration as an investment company had not been interrupted. The memorandum cites in considerable detail various examples of such transactions and specifically designates the section or sections of the investment act which it states would have been violated if applicable.

[fol. 580] The memorandum quotes and discusses section 5 of the Interstate Commerce Act, under which we have the power to regulate the corporate structure and financial practices of holding companies which control subsidiary carrier companies, and to order their compliance with certain enumerated sections of the Act, as safeguards to the subsidiaries concerned and to the public interest. In view of these powers, the S.E.C. suggests that the substantive provisions of the investment act would provide sufficient assurance of stockholder and public protection, and compliance with the underlying objectives of the Interstate Commerce Act, to permit the exercise of our discretion under section 5(3), not to subject Alleghany to the presently applicable sections of the Act. The application of certain provisions of the investment act to investment companies such as Alleghany, the S. E. C. contends, will provide adequate protection against over-capitalization and imbalance between the company's debt and preferred

stock, and its common stock equity. The S. E. C. points out that the exercise of our discretion, as suggested, would not relieve Alleghany or any other person from compliance with section 5(2) of the Act, regarding the approval or denial of control of carriers.

In its reply, filed October 14, 1954, supported by a separate memorandum from Central in reply to the memorandum of the S. E. C., Alleghany argues that to follow the suggestions of the S. E. C. would severely hamper the desired financing and operation of Alleghany and Central and its subsidiary carriers. Based on the present proceeding being identical in all pertinent and material respects with the facts and proceedings in the *Chesapeake* case, Allephany contends that under that precedent, we are required to find Alleghany to be a carrier subject to the enumerated provisions of the Act, to the same extent as in the order of June 5, 1945, and that to do otherwise would cause conflict and confusion. The replies deny that any of Alleghany's transactions in securities which we considered and approved were contrary to the best interests of the public investors whom the investment act seeks to protect.

Alleghany asserts that section 5(3) of the Act makes it mandatory that a holding company which controls a sizable rail carrier shall be regulated by us, and that the only criterion is whether the noncarrier person controls a major railroad system. On the contrary that section provides merely that to the extent indicated in our order authorizing control of one or more carriers under section 5(2) of the act the holding company shall be subjected to the various sections of the act enumerated. The Alleghany shows that it has been changing its investments back to rail securities, such as by the acquisition, since August 31, 1954, of additional shares of Central stock costing $181,707, and other rail securities at a cost of $1,766,346; that its present investments are 52 percent in rail securities; and that as soon as practicable, it will divest itself of nonrail securities until its total investments, excluding Government bonds, will be not less than 75 percent in rail securities. The latter program is said to contemplate the issuance by us of an order requiring trustee

arrangements for Alleghany's holdings of rail stocks outside the Central system.

[fol. 581] Regarding the holdings by Alleghany of I. D. S. securities, the reply points out that the latter company is completely under the jurisdiction of the S. E. C., and that Alleghany being subject to the same regulation would in no manner increase its regulation of I. D. S. Alleghany contends that its public investors have benefited since being regulated by us; that the S. E. C. failed to intervene or make any representations in the transactions approved by us since 1945; and that the S. E. C. apparently is seeking to amend the laws involved and to ignore the exclusive and plenary authority over carriers which the Congress has conferred upon us. In conclusion, Alleghany asserts that we have jurisdiction over holding companies which we authorize to control one or more railroads; that Alleghany has had that status for more than 9 years; and that Alleghany's primary business is to invest in railroad securities. Therefore, Alleghany urges that its status as a carrier should not be changed.

Supplemental memorandum of S. E. C. and reply thereto. —By order dated December 20, 1954, S. E. C. was permitted to enlarge its limited intervention herein to admit the filing of a supplemental memorandum dated December 14, 1954. S. E. C. states that this memorandum, which is in the nature of a reply to Alleghany's reply, is filed "to clarify several significant issues," which show that neither section 5(3) of the Act, nor prior decisions thereunder require the continued regulation of Alleghany as a carrier.

The concern of the Interstate Commerce Commission and the Congress prior to the enactment of section 5(3) is stated by S. E. C. to have been to prevent the use of the railroad holding company device to effectuate consolidation of railroad systems without regard to the Act and the public interest; that the anticipated control of the railroad holding companies was in relation only to their character to that extent, as opposed to their character as investment companies; and that Alleghany had been cited as a "striking illustration" why section 5 needed amending, because, unlike now, it then engaged almost exclusively

in the transportation business by means of control of carriers whose securities constituted almost all the company's assets. Further, S. E. C. shows (by footnote) that during the period of almost 5 years prior to October 1945, while Alleghany was registered under the investment act, it filed only one application to engage in a transaction requiring S. E. C. consideration, but in recent years, a number of transactions engaged in by Alleghany would have required S. E. C. consideration, if Alleghany had remained subject to the investment act.

In a second section of the supplemental memorandum, S. E. C. cites various previously discussed sections of the investment act, to show that the regulation of Alleghany under that law would best serve the public interest and need not lead to any conflict between S. E. C. and the Interstate Commerce Commission. Based upon the conclusion that the primary nature of Alleghany's business presently is in the investment field rather than in transportation, S. E. C. reiterates its statement that public investors in Alleghany should be afforded the safeguards which Congress established for their protection by passage of the investment act, and which are unlike the safe-[fol. 582] guards contained in the Interstate Commerce Act. The S. E. C. asserts that we should not decide which agency should regulate Alleghany on the hypothetical future situation which Alleghany states will arise when it changes its investment portfolio to contain predominantly rail securities, because if the prospective carrier holdings do not involve control, or if they are to be placed in trust, the holdings would represent investments only, and Alleghany would remain in the position of an investment company—not that of a carrier.

Alleghany filed its reply to the supplemental memorandum of S. E. C. on December 31, 1954. According to the reply, S. E. C. is suggesting that we ignore the intent of the Congress when it enacted section 5(3) of the Act, and section 3(c)(9) of the investment act. Alleghany denies that any facts relating to its investments in, and control of, noncarrier companies, the fluctuations in the percentage of its holdings in railroad and nonrailroad securities, the relationship of funds invested in railroad

securities now as compared to any previous period or date, or the degree of its activity in trading railroad or other securities, can operate to transmute Alleghany in character from a "railroad holding company" to an "investment company." The former is defined as a company which not only invests in railroads, but exercises control of them; and the latter is defined as a company which assumes none of the responsibilities of management and control of the companies whose securities it holds. Alleghany contends that this distinction was recognized in the recommendations occurring in the considerations of the Congress, which led to the enactment of section 5(3); and that the Congress then had no interest in regulating investment companies which held only railroad securities, but, prescribed regulation by this Commission of companies which controlled one or more railroads.

Regarding the second portion of the supplemental memorandum, Alleghany contends that any duality of jurisdiction exercised by this Commission and S. E. C. would result in conflict and confusion regarding any corporate action by Alleghany; that since Alleghany has been considered as a carrier subject to the Interstate Commerce Act, S. E. C. has refrained from applying the investment act provisions to Alleghany, and has failed to intervene in any transaction submitted from this Commission's consideration; and that the vast improvement in the status of Alleghany's security holders since 1945 is evidence that regulation by this Commission has protected and furthered the interests of the public investors. In conclusion, Alleghany requests us to disregard the position of S. E. C. in this proceeding. Alleghany also requests that the applications herein be granted at the earliest possible date, because certain financial transactions important to Alleghany and Central are being delayed to the prejudice of both corporations and their respective security holders.

We have considered the representations and rebuttal herein concerning the proper Governmental agency to exercise regulatory jurisdiction over a specified type of in- [fol. 583] vestment company. It appears to us, as it does to Alleghany, that S. E. C. primarily is interested in achieving some degree of alteration of the effect of certain

provisions of the Interstate Commerce Act and the Investment Company Act of 1940. Such a result, in our opinion, must be accomplished by amendatory action of the Congress of the United States. Except that we have the power to impose just and reasonable conditions, we are bound to apply the provisions of the Interstate Commerce Act in the manner we consider best protects the interest of the public in the field of transportation in interstate commerce. We have no discretionary power to yield our jurisdiction to any statutory agency. The S. E. C. has not offered for our consideration any specific terms or conditions to be imposed as a matter of protecting the public interest, in the event we should determine that Alleghany continue its status as a carrier subject to the Act.

We recognize that the present control of the Central system has passed to Alleghany by regular corporate procedures even though our approval in the premises has not been sought. Accordingly, its influence on the national transportation system which we regulate is immediate in effect and wide in scope. We do not think that we should deprive ourselves of information necessary to the regulatory process and of value to the public generally with respect to a concern playing such an important role in transportation. In our opinion the diversification of Alleghany's holdings as between railroad and nonrailroad or noncontrolled railroad securities is not of substantial importance. The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility. In addition to Alleghany we have heretofore subjected other holding companies to the provisions of sections 20 (1) to (10) and section 20a (2) to (11); namely, the Pennsylvania Company, *Wabash R. Co. Control*, 247 I.C.C. 365, decided July 29, 1941; the Delaware and Hudson Company, *Delaware & H. R. Corp. Debt Adjustment*, 254 I.C.C. 339, decided March 24, 1943; and the Atlantic Coast Line Company, *Atlantic Coast Line R. Co. Purchase*, 261 I.C.C. 820 (not printed in full), decided December 12, 1945. Reasons dictating the necessity for making the foregoing holding companies subject to the Act for the purposes stated in section 5(3) were not different than those exist-

ing with respect to Alleghany's control of Central. While not of controlling importance there were certain similarities to the Alleghany. The Atlantic Coast Line Company had been held by the S. E. C. to be a closed-end investment company within the meaning of the Investment Company Act of 1940. There was considerable diversification in the investment portfolio of the Delaware & Hudson Company. In *Delaware & H. R. Corp. Debt Adjustment, supra,* page 242, we pointed out that after transfer of the railroad activities to a new company the Delaware & Hudson Company would become a holding company with assets represented by stocks of railroad, coal, mining, steamboat, and hotel companies. The record also shows that *that* Alleghany's investment portfolio for the future probably will consist primarily of railroad securities.

[fol. 584] For the reasons stated we think that we are warranted in continuing Alleghany in its present status. Accordingly, we will, pursuant to section 5(3), subject Alleghany to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act. In the event that future circumstances warrant any change or modification of this finding, we retain jurisdiction to enter any order we deem necessary to protect the public interest.

The proposed merger.—Effective as of December 31, 1954, upon our approval and authorization, the properties and franchises of Jeffersonville will be merged into the Big Four for ownership, management, and operation in accordance with a proposed formal agreement of merger dated September 14, 1954, copy of which is made part of the application. In consideration for the transfer of the railroads, properties, interests, rights, privileges, and franchises (except the franchise to be a Kentucky corporation), the Big Four will assume the contracts, deeds, obligations, liabilities, and duties of Jeffersonville, and the shares and certificates of its capital stock will be canceled. All intercompany indebtedness and contractual obligations will be extinguished without the impairment of the rights of third parties. No seeurities are to be acquired by any of the applicants in consummating the proposed transaction, and the capitalization of the Big Four will not be affected. The Big Four, as the surviving corporation, as at present, will

remain a corporation of Ohio and Indiana. The properties of Jeffersonville, after the merger, will be operated by Central as part of the owned lines of railroad of Big Four, under the after-acquired property provisions of an existing lease.

The applicants, in effecting the merger, will observe to the full extent required by section 5(11) of the Act, and as far as practicable otherwise, the requirements of State law, particularly as regards procedure, notice of stockholders' meetings, form of merger agreement and the filing thereof in the offices of the respective Secretaries of State. They do not propose to request approval of State Commissions or to make the taking of effect of the merger dependent upon the filing thereof in State offices. Compliance with certain laws of Kentucky in the applicants' opinion would defeat the purpose of the merger; namely, the simplification of the corporate structure of the Big Four portion of the Central's system, and also would involve needless expense and impose an unnecessary burden on interstate commerce. This they say would be neither in the public interest nor consistent with the national transportation policy. The Kentucky laws provide that corporations of any other State may not possess, control, maintain, or operate a railroad in Kentucky, unless they first file an acceptance of the State constitution and become a domestic corporation of Kentucky;[3] that when a Kentucky corporation consolidates with a corporation of any other State, it does not thereby become a foreign cor- [fol. 585] poration as to Kentucky; and that charter papers, including mergers, in order to become effective, must first be filed with the office of the Secretary of State.

In support of their request for relief from such restrictive State laws, the applicants cite, among other decisions, *Schwabacher* v. *United States*, 334 U. S. 182, 194-5, in which the Supreme Court found that in cases of merger under section 5 of the Act, State laws and charters must yield to the Interstate Commerce Act, and that approval of a voluntary railroad merger under the Act is dependent primarily upon two particular considerations specified in

[3] Kentucky Constitution, section 200, and Kentucky Revised Statutes, sections 277.020, 277.110, 271.465 *et seq.*

paragraph (2)(b), and another in paragraph (11) of section 5. The Court then stated, "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, . . ." In connection with the merger proposed herein, we need make no specific findings or prescribe any conditions other than those required by the Act, in order to afford the applicants the relief they request from the applicability of the State laws.

The lines of railroad of the Big Four, including those of the Peoria & Eastern Railroad Company and the Central Railroad Company of Indianapolis, include 2,007.56 miles of main line and 244.57 miles of branch line, total 2,252.13 miles, radiating from Indianapolis, Ind., to points in Indiana, Ohio, Michigan, and Illinois. The lines of the Peoria & Eastern Railway aggregate 201.53 miles of main line and no branch line. The Central Railroad of Indianapolis consists of 1.94 miles of yard switching tracks in Indianapolis. The lines of the Jeffersonville extend 2.70 miles from Jeffersonville, Ind., where it connects for the interchange of traffic with the Pennsylvania Railroad and the Baltimore & Ohio Railroad, to Louisville, Ky., where it connects with the Louisville & Nashville Railroad, the Illinois Central Railroad, and the Chesapeake. With its yard tracks and sidings, it comprises about 23 miles of track. The Big Four does not physically connect with the Jeffersonville, but under trackage rights over the Baltimore & Ohio, operates from Mount Vernon, Ind., to Jeffersonville, 52.21 miles. The trackage rights are used by Central as lessee of the Big Four properties.

The final valuation of the properties, less working capital, of Big Four and Jeffersonville, as of June 30, 1915, found by us for rate making purposes in Valuation Dockets Nos. 264, and 178, respectively, were (Big Four figures shown first) $141,776,640, $2,850,000; investment in roadway and equipment as of the same date $144,375,812, $4,103,987; and value of additions and betterments since the date of valuation to June 30, 1954, $188,699,640, and $2,463,989. The property of Jeffersonville is not encumbered by any mortgage or similar indenture. However, parts of the property are subject to trackage rights in fa-

vor of Big Four and Chesapeake. The trackage rights of Big Four are subject to its refunding and improvement mortgage dated June 27, 1919, and Central's interest therein is subject to its refunding and improvement mortgage dated October 1, 1913. Both mortgages permit the modification or termination of the trackage rights.

[fol. 586] The general balance sheet of Jeffersonville of June 30, 1954, shows investments (cents omitted) $5,089,398, after deduction of $1,549,915 accrued depreciation and $2,006 donations and grants; current assets $352,770, including among other items $124,791 cash, and $115,230 miscellaneous accounts receivable; unadjusted debits (prepayments) $46; total assets $5,442,215; liabilities—capital stock $1,425,000; long-term debt $7,365,000; current liabilities $302,368; including among other items $161,896 interest matured unpaid; deferred liabilities $12,097, unadjusted credits (insurance reserves) $3,748, earned surplus $3,665,998 (debit), of which $2,876 is appropriated, and $3,668,874 (debit) is unappropriated.

The proposed merger will effect savings by the elimination of the cost of maintaining Jeffersonville as a separate entity with the attendant expenses of directors and stockholders' meetings, savings in accounting and other expenses, and elimination of various reports to regulatory agencies. The time of officers and employees of the offices of the secretary, accounting, law, and treasury departments of the Jeffersonville, presently devoted to its affairs, may be directed into productive channels so as to enable the realization of savings. No change in traffic and gross revenues is expected to result from the merger as there will be no substantial change in the operations.

Modification of lease.—The properties of Jeffersonville which Big Four will acquire pursuant to the merger proposed herein will be operated by Central as part of the owned lines of Big Four, under the terms and during the remainder of the effective period of a lease of January 2, 1930. That lease was entered into pursuant to reports of the Commission in *New York Central Unification, supra,* dated January 14, 1929, (150 I.C.C. 278), and July 2, 1929

(154 I.C.C. 489).[4] Its terms and conditions were modified by supplemental leases described in reports dated July 12, 1937 (221 I.C.C. 573), and December 30, 1942 (254 I.C.C. 837), not printed in full. A confirmatory supplemental lease approved by us June 17, 1938, in *Cleveland, C. C. & St. L. Ry. Co. Merger, supra,* (228 I.C.C. 240), gave effect to the merger of eight related carrier corporations into Big Four.

Big Four as lessor and Central as lessee present a draft of a confirmatory supplemental lease pursuant to which the properties of Jeffersonville, when acquired through the proposed merger, are to be included in the *res* of the lease of January 2, 1930, as supplemented. The supplemental lease also includes all rights, titles, and interests of the lessor in the use of certain other railroad properties under grants to Jeffersonville in common with other carriers, in- [fol. 587] cluding trackage rights for the use of properties of Jeffersonville pursuant to an agreement dated January 1, 1927,[5] and, for the term of the lease, Big Four's interest in holdings of capital stock and bonds of certain companies, including the outstanding 14,250 shares of capital stock of Jeffersonville. In consideration for the inclusion of the affected properties, the supplement provides that Central will release to Big Four all its interest in the shares of stock of Jeffersonville, so that they may be canceled. The Lease of the property acquired under the merger herein, is subject to all mortgages, liens, encumbrances, charges, and obligations affecting the properties involved. The confirmatory supplemental lease will be effective from its date, for and during the term, and upon the terms and conditions provided in the initial lease as amended.

Conclusions and findings.—Of the conclusions upon which our findings enumerated below are founded, some have

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[4] In *New York Central R. Co. Assumption,* 158 I.C.C. 317, decided December 2, 1929, we authorized Central as lessee, to assume obligation and liability in respect of securities under provisions of the then proposed lease of properties of Big Four.

[5] See *Control of L. & J. Bridge & R. R.,* 145 I.C.C. 131.

been set forth and discussed in relation to the various topics of this report. Other conclusions yet require our attention.

The only remaining effective portion of our approval and authorization contained in the report and order of June 5, 1945, in the *Chesapeake* case, is that in respect to Alleghany being subject to certain sections of the Act. For the reason that the *Chesapeake* case order required only the filing of quarterly reports to show which securities held by Alleghany and Chesapeake were deposited in the voting trusts provided for in the report and order, no order by us presently is necessary to effect the expiration or termination of the trusts. Upon the issuance of the order in Finance Docket No. 18656, Alleghany will continue to be considered as a carrier subject to the Act, through the vehicle of the Central system in lieu of through the Chesapeake system, and that section of the presently effective portion of the order of June 5, 1945, will be superseded. At that time, the show cause order of June 22, 1954, will become moot.

Alleghany owns securities of the Missouri Pacific Railroad, as shown hereinbefore, but the voting power attached to the ownership thereof is divorced from the securities, and will remain so until a reorganization plan, approved by us and the Court having jurisdiction over the bankruptcy proceeding is formally adopted, consummated, and authorized, or if the proceeding is appropriately otherwise terminated. It is our view that if and when Alleghany obtains voting securities of the corporation succeeding the present Missouri Pacific Railroad Company, Alleghany will be required to deposit those securities with an independent trustee nominated by Alleghany and approved by the Commission.

[fol. 588] The foregoing provision for an independent voting trustee is not to be construed as giving advance approval or waiving in any manner the requirements of section 5(2) of the Act with respect to acquisition of stock by Alleghany whereby it may acquire, accomplish, or effectuate direct or indirect control, or management in a common interest, of any additional carriers subject to the Act. Presumably, when such situations arise in the fu-

ture, Alleghany will comply with the provisions of section 5(2). In this connection, see *Alleghany Corp.* v. *James Foundation of New York,* 115 F. Supp. 282, and 214 F. 2d 446. Similarly, our powers under section 5(7), to investigate and determine whether Alleghany, or any company or person associated with Alleghany, is violating the provisions of paragraph (4) of section 5, remain intact. Any interlocking directorates not presently authorized by us under section 20a(12) of the Act, as between Alleghany or Central and its subsidiary and affiliated carriers on the one hand, and any other carrier subject to the Act, on the other, should be brought to the attention of the Commission for its consideration and approval.

Contentions not discussed in the report herein, and requested conclusions and findings based thereon, have been given consideration and were found without merit, or not justified in view of the decision and order herein.

The facts and circumstances, and our conclusions thereon, which we have reviewed hereinabove, support our opinion that approval and authorization of the transactions proposed by Alleghany and Central in conjunction with Big Four and Jeffersonville are justified. The changes in the form of the existing control of the properties and franchises of Jeffersonville will simplify the corporate structure of the Big Four division of the Central system. The end result will be increased efficiency and greater economy in the operation of the lines in question, by reduction of the number of system companies. The transactions will not affect transportation service to the public. No increase in total fixed charges will accrue, and no guaranty or assumption of the payment of dividends or fixed charges is contemplated. No other railroads have sought to be included in the transactions.

The applicants do not contemplate that there will be any reduction in the number of employees as a result of any of the transactions herein. However, if conditions for the protection of employees are found to be necessary, the applicants request that they be imposed only to the extent required by the provisions of section 5(2)(f). Our authorizations herein will be subject to the same conditions for the protection of employees as prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I.C.C. 672.

Subject to the conditions for the protection of employees mentioned and the condition relating to deposit of specified railroad securities with an independent voting trustee, we find the following:

[fol. 589] 1. (a) That merger of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by The New York Central Railroad Company and the Alleghany Corporation; and,

(b) That modification of the lease of January 2, 1930, under which The New York Central Railroad Company, lessee, operates the property of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, lessor, to give effect to the merger described in (a), all as described herein, are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest.

And, as listed below, we further find:

2. That Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended;

3. That effective portions of the order of June 5, 1945, in Finance Docket No. 14692, shall be terminated and be of no further force and effect; and

4. That jurisdiction herein shall be retained to make such further order or orders as hereafter may be necessary or appropriate.

An appropriate order will be entered herein, in which suitable provision will be made for the submission of journal entries and compliance with valuation order No. 24, dated May 15, 1928. The order also will provide that within 15 days after the execution of the agreements of

merger and the confirmatory supplemental lease herein authorized, verified copies of those instruments shall be filed with this Commission.

[fol. 590] APPENDIX

List of carriers referred to as included in or affiliated with the New York Central Railroad system.

Battle Creek & Sturgis Railway Company
Beech Creek Extension Railroad Company
Beech Creek Railroad Company
Boston & Albany Railroad Company
The Boston Terminal Company
The Boston Terminal Corporation
Calumet Western Railway Company
Cambria and Indiana Railroad Company
Central Indiana Railway Company
Central Railroad Company of Indianapolis
Cherry Tree and Dixonville Railroad Company
Chicago Junction Railway Company
Chicago, Kalamazoo and Saginaw Railway Company
The Chicago River and Indiana Railroad Company
The Cincinnati Union Terminal Company
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
The Cleveland Union Terminals Company
Dayton Union Railway Company
The Detroit, Hillsdale and South Western Railroad Company
Detroit Manufacturers' Railroad
Detroit River Tunnel Company
Detroit Terminal Railroad Company
Detroit, Toledo & Milwaukee Railroad Company
The Erie and Kalamazoo Railroad Company
Fort Wayne and Jackson Railroad Company
Fort Wayne Union Railway Company
The Hudson River Connecting Railroad Corporation
Illinois Northern Railway
Indiana Harbor Belt Railroad Company
The Indianapolis Union Railway Company
Joliet and Northern Indiana Railroad Company

The Kalamazoo, Alleghany and Grand Rapids Railroad Company
The Lake Erie and Eastern Railroad Company
The Lake Erie and Pittsburgh Railway Company
The Lakefront Dock and Railroad Terminal Company
Lansing Manufacturers Railroad
Lansing Transit Railway Company
Louisville & Jeffersonville Bridge and Railroad Company
[fol. 591] The Mahoning and Shenango Valley Railway Company
The Mahoning Coal Railroad Company
The Mahoning State Line Railroad Company
Michigan Air Line Railroad Company
The Michigan Central Railroad Company
Mingo Valley Railroad Company
The Monongahela Railway Company
Montour Railroad Company
Mt. Gilead Short Line Railway
The New York and Harlem Railroad Company
The New York Central Railroad Company
Niagara Junction Railway Company
Nicholas, Fayette and Greenbrier Railroad Company
North Brookfield Railroad Company
The Owasco River Railway
The Peoria and Eastern Railway Company
Peoria & Pekin Union Railway Company
Pittsburgh and Clearfield Railroad Company
The Pittsburgh and Lake Erie Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
The Pittsburgh, McKeesport and Youghiogheny Railroad Company
The Pittsfield and North Adams Railroad Corporation
The Providence, Webster and Springfield Railroad Company
Railway Express Agency, Incorporated
The St. Lawrence & Adirondack Railway Company
Shenango Valley Railroad Company
The Stewart Railroad Company
Terminal Railroad Association of St. Louis
The Toledo Terminal Railroad Company
Troy and Greenbush Railroad Association

The Troy Union Railroad Company
Union Depot Company (Columbus, Ohio)
Ware River Railroad Company
Youngstown & Southern Railway Company
The Zanesville Terminal Railroad Company

[fol. 592] BEFORE THE INTERSTATE COMMERCE COMMISSION,

DIVISION 4

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY, MERGER, ETC.

ORDER—March 2, 1955

Finance Docket No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions for the protection of employees, and relating to deposit of specified railroad securities with an independent voting trustee referred to in the report aforesaid, (a) merger of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by The New York Central Railroad Company and the Alleghany Corporation; and (b) modification of the lease of January 2, 1930, under which The New York Central Railroad Company, lessee, operates the property of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, lessor, to give effect to the merger described in

(a) above, upon the terms and conditions in said report found just and reasonable, be, and there are hereby, approved and authorized.

It is further ordered, That unless and until otherwise ordered by this Commission, said Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to The New York Central Railroad Company and its carrier subsidiaries and affiliates; *Provided*, that, as to the applicability of said provisions of section 20 and section 20(a) to said Alleghany Corporation, this order shall take effect and be in force on and after the date hereof, except that as to the provisions of section 20, pertaining to annual reports, it shall be deemed effective as of January 1, 1955.

[fol. 593] *It is further ordered*, That the effective portions of the order of June 5, 1945, in Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc., be and they are hereby terminated and shall be of no further force and effect.

It is further ordered, That the jurisdiction of this Commission be, and it is hereby retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate.

It is further ordered, That the Cleveland, Cincinnati, Chicago and St. Louis Railway Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

It is further ordered, That, if the authority herein granted is exercised, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company shall submit for the consideration and approval of this Commission, three copies of the journal entries required to record the transactions authorized herein.

And it is further ordered, That within 15 days after the execution of the agreements of merger and the confirmatory supplemental lease set forth in the report aforesaid, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and The New York Central Railroad Company,

respectively, shall file verified copies thereof with this Commission.

By the Commission, division 4.

Harold D. McCoy, Secretary.

[fol. 594] BEFORE THE INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD COMPANY MERGER

Finance Docket No. 18656

APPLICATION FOR REHEARANG, AND RECONSIDERATION—Filed March 21, 1955

Come now Lewis D. and John Gilbert and Breswick & Company, stockholders in the Alleghany Corporation, by their attorney, and respectively move the Commission to reconsider their petitions for leave to intervene herein, filed on January 11, 1955 and February 4, 1955, and an amended petition for leave to intervene, filed on February 21, 1955, which were denied by orders of Division 4, dated February 9, and 15, 1955 and March 2, 1955.

Applicants hereby appeal to the Commission to reverse said orders of Division 4 and admit them to these proceedings with the full rights of parties thereto.

In support of said appeal, applicants show:

1. The orders denying intervention are arbitrary, capricious and unreasonable, because the March 2, 1955 report of Division 4 takes cognizance of the issues raised by said petitions and discusses them at length and decides them on the merits.

2. The effect of the March 2, 1955 report and order, if final and not set aside, will be to transmute applicants' stock in Alleghany Corporation from that in an investment company, as defined by the Investment

Company Act of 1940, into that in a carrier, as defined by the Interstate Commerce Act. Such a result will deprive said stock of valuable rights and privileges.

3. The intervention of the S.E.C. herein is limited to urging the Commission to deny Alleghany's appli- [fol. 595] cation as a matter of discretion, while applicants here urge denial on the basis of absence of statutory power and violation of the Investment Company and Interstate Commerce Acts.

4. That no broadening of the issues is sought.

5. That for the reasons set forth in the petitions for intervention and amended petition and supporting statements, and which are overruled by the March 2, 1955 report and order, the application of Alleghany Corporation herein should be denied or dismissed.

Wherefore, applicants urge this Honorable Commission to rehear and reconsider the aforesaid petitions and annexed petition, and grant applicants intervention herein with the full rights of parties, and deny or dismiss the application by Alleghany Corporation herein.

Respectfully submitted, Joseph B. Hyman, Attorney for Petitioners, 211 South Pitt Street, Alexandria, Virginia.

Certificate of Service (omitted in printing)

[fol. 596] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18789[1]

BOSTON & ALBANY RAILROAD COMPANY ET AL. CONTROL

REPORT

Submitted March 4, 1955. Decided March 22, 1955

1. Acquisition by The New York Central Railroad Company, through stock ownership, of direct control, and by Alleghany Corporation of indirect control, of Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation, and Ware River Railroad Company, approved and authorized.

2. Authority granted to The New York Central Railroad Company, (1) to issue not exceeding $37,500,000, principal amount, of 25-year collateral trust 6-percent bonds in exchange for up to 250,000 shares of capital stock of Boston and Albany Railroad Company, $377,800, principal amount, of 25-year collateral trust 5¼-percent bonds in exchange for up to 3,778 shares of capital stock of The Pittsfield and North Adams Railroad Corporation, and $937,500, principal amount, of 25-year collateral trust 5¾-percent bonds in exchange for up to 7,500 shares of capital stock of Ware River Railroad Company; and (2) to pledge as partial collateral security for such collateral trust bonds not exceeding initially $37,500,000, $378,000, and $938,000, principal amount, respectively, of its refunding and improvement mortgage 5-percent bonds, series C, due October 1, 2013. Prior report, — I. C. C. —.

Harold H. McLean and Edward K. Wheeler for applicants.

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[1] This report embraces Finance Docket No. 18790, New York Central Railroad Company Securities.

Division 4, Commissioners Johnson, Elliott, and Tuggle by Division 4:

The New York Central Railroad Company and Alleghany Corporation, hereinafter called Central and Alleghany, respectively, on December 17, 1954, in Finance Docket No. 18789, applied for authority under section 5(2) of the Interstate Commerce Act for the former, and through it the latter, to acquire control of the Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation, and the Ware River Railroad [fol. 597] Company, hereinafter called the Boston & Albany, Pittsfield, and Ware River, respectively, through ownership by Central of their capital stock.

By an application in Finance Docket No. 18790, also filed December 17, 1954, Central applied for authority under section 20a of the act, (1) to issue certificates of deposit in respect of not exceeding in the aggregate 261,278 shares of capital stock of Boston & Albany, Pittsfield, and Ware River; (2) to issue not exceeding $38,815,300, total principal amount, of 25-year collateral trust bonds in exchange for all the capital stock of the lessor companies outstanding in the hands of the public; and (3) to pledge as partial security for such collateral trust bonds its refunding and improvement mortgage 5-percent bonds, series C, due October 1, 2013, hereinafter sometimes called the series C bonds, in total principal amount not exceeding initially $38,816,000.

No representations have been made by any State authority and no objection to granting the application has been presented. Inasmuch as the proposals will not affect existing transportation service to the public, in our opinion a public hearing is not required in the public interest.

Central is the parent company of the New York Central system which includes about 73 subsidiary or affiliated companies controlled through stock ownership by the Central or the properties of which are operated by it under lease. Central was organized and exists under the laws of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan, and it owns or leases lines of railroad in those

states and in New Jersey, Massachusetts, West Virginia, and Canada, and operates under trackage rights as lessee of a subsidiary in Kentucky and Missouri. It was created by consolidation of the New York Central & Hudson River [fol. 598] Railroad Company, the Lake Shore & Michigan Southern Railway Company, and others, under an agreement dated April 29, 1914, and pursuant to our order of June 18, 1952, in Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 I.C.C. 813 (not printed in full), it merged into itself certain wholly owned and subsidiary carriers. Its corporate history is further shown in *New York Central Unification*, 150 I.C.C. 278, 154 I.C.C. 489.

Alleghany is a Maryland corporation and also authorized to do business in New York and Delaware. Its charter provides for broad powers to engage in any lawful business, and since its creation it has been engaged in the investment business dealing in corporate securities, including, to a large extent, securities of railroad companies subject to the act. By virtue of its acquisition of control of the Chesapeake & Ohio Railway Company and other carriers in our order of June 5, 1945, Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase*, 261 I.C.C. 239, we held that Alleghany was to be considered a carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the act. Alleghany now avers that its control of, and relationship with, the carriers described in the above-mentioned proceeding has been terminated, but that in lieu thereof, in June 1954, it acquired control of Central in a proxy contest in which Alleghany's slate of nominees was elected as Central's board of directors. The latter's stock is widely held, but Alleghany has an undivided one-half interest in 600,000 shares of such stock and full voting rights with respect thereto under joint venture agreements and, in addition, owns 279,400 shares directly. The voting rights of Alleghany represent approximately 14 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same posi- [fol. 599] tion with Central, beneficially owns 102,000 shares of the latter's stock. The president of Alleghany,

who also is a director of Central, beneficially owns 300,100 shares of the latter's stock. The voting rights of Alleghany, its chairman of the board, and its president represent, as of the date of the application approximately 20 percent of the total shares of Central outstanding. The vice president of Alleghany also is a vice president of Central. Alleghany is not controlled by any corporation or group of corporations.

In *Louisville & J.B. & R. Co. Merger*—I.C.C.—decided March 2, 1955, among other things, we authorized the merger of the properties of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and through the ownership of stock of the latter company, continuation of control of the properties of the former company by the Central directly and Alleghany indirectly. In that proceeding we recognized that control of the Central system had been acquired by Alleghany. In our order therein, we held that Alleghany should continue to be considered a carrier subject to the provisions of section 20(1) to (10) inclusive, and section 20a (2) to (11) inclusive, of the act to the same extent as applicable to the New York Central and its subsidiaries and affiliates. The similar provisions in our order of June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase, Supra,* were terminated by the order of March 2, 1955. The application of Alleghany for authority to control indirectly the carriers involved is predicated upon the necessity for securing our approval of the internal rearrangements of the Central's corporate structure pursuant to the determination of the Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U.S. 31, and by us in *Chesapeake & O. Ry. Co.* [fol. 600] *Purchase, Supra*; *Nicholas Fayette & Greenbrier R. Co. Lease,* 261 I.C.C. 546, and other decisions. Alleghany, in addition to its control of Central, owns $2,879,000, principal amount, of bonds and 396,000 shares of common stock of the Missouri Pacific Railroad Company which presently is in reorganization under section 77 of the Bankruptcy Act. In *Louisville & J. B. & R. Co. Merger, Supra,* provision was made that if and when voting securities of the corporation succeeding the Mis-

souri Pacific Railroad Company are acquired by Alleghany, it will be required to deposit them with an independent trustee. In conformity with our action in the foregoing proceeding, if we find that the proposed transactions, as part of Alleghany's program, are within the scope of our authority and will be consistent with the public interest, we will grant the applications subject to such terms and conditions as we may deem just and reasonable.

Central operates the railroad properties of the Boston & Albany under a lease dated November 15, 1899 (as modified September 19, 1900) for a term of 99 years from July 1, 1900, and by virtue of that lease acquired all right, title, and interest of the Boston & Albany in and to all railroads operated by the latter under lease or otherwise, including the railroad of the Pittsfield held under lease dated November 25, 1876, for a term of 99 years from December 1, 1876, and of the Ware River held under lease dated January 13, 1874, for a term of 999 years from January 1, 1874. The Central owns 722 shares of the Pittsfiled's capital stock, but owns no shares of the capital stocks of the Boston & Albany or Ware River. As of October 31, 1954, the Boston & Albany, Pittsfield, and Ware River, respectively, had 250,000, 4,500 and 7,500 shares of capital stock outstanding of the par value of $100 a share.

[fol. 601] Boston & Albany's route extends in a general easterly and westerly direction between Boston, Mass., and Rensselaer, N. Y., and embraces 199.24 miles of main line and 62.48 miles of branch line. It interchanges freight at one or more junctions in Massachusetts or New York with Central, the Boston & Maine Railroad, the Delaware & Hudson Railroad, the New York, New Haven & Hartford Railroad, the Rutland Railway, and with its leased lines, the Pittsfield and Ware River. Pittsfield's line extends in a general northerly direction from a connection with the Boston & Albany at North Adams Junction, Mass., about 2.5 miles east of Pittsfield, to North Adams, Mass., approximately 18.45 miles. It has no branch. Its interchange points are at North Adams Junction and North Adams with the Boston & Albany and Boston & Maine, respectively. The line of the Ware River extends in a general northerly direction from a connection with the

Boston & Albany at Palmer, Mass., to Winchendon, Mass., approximately 49.47 miles. It has no branch. It has interchange connections with the Boston & Albany and Central Vermont Railway at Palmer and with the Boston & Maine at Baldwinsville, Ware, and Winchendon, Mass. Values of the properties of the three carriers under consideration for rate-making purposes as reported by Division 1, as of June 30, 1917, and additions and betterments less retirements, as shown by the applicants, from the date of valuation to October 31, 1954, respectively, are as follows: Boston & Albany $86,526,064 and $2,620,291; Pittsfield $995,000 and $4,874; and Ware River $1,160,000 and $28,187. The original valuations indicated are shown in *New York Central R. Co.*, 28 Val. Rep. 1 (112,136,146).

By our order of January 14, 1955, in Finance Docket No. 18790, — I.C.C. —, not printed in full, we authorized Central to issue certificates of deposit in respect of not ex- [fol. 602] ceeding 250,000 shares of capital stock of the Boston & Albany, 3,778 shares of capital stock of the Pittsfield, and 7,500 shares of capital stock of the Ware River that may be deposited in accordance with the terms, conditions, and provisions of the hereinafter described exchange offers dated December 17, 1954, made by Central to the holders of such stock, but we deferred action upon Central's request for authority to issue collateral trust bonds and to pledge series C bonds as partial security therefor.

The proposed acquisitions of control are to be effected by the issue of bonds by Central to the stockholders of the lessor companies in exchange for their shares of capital stock. In brief, Central is offering to exchange for such shares of stock outstanding in the hands of the public, its 25-year collateral trust bonds to be issued under and secured by indentures, as follows:

> In exchange for each share of Boston & Albany stock, par value $100, Central offers $150, principal amount, of 6-percent collateral trust bonds secured by pledge under the applicable indenture of one share of Boston & Albany stock and $150, principal amount, of its series C bonds for each $150, principal amount, of 6-percent bonds issued thereunder;

In exchange for each share of Pittsfield stock, par value $100, exclusive of the 722 shares owned by Central, it offers $100, principal amount, of 5¼-percent collateral trust bonds secured by pledge under the applicable indenture of one share of Pittsfield stock and $100, principal amount, of its series C bonds for each $100, principal amount, of 5¼-percent bonds issued thereunder; and

In exchange for each share of Ware River stock, par value $100, Central offers $125, principal amount, of 5¾-percent collateral trust bonds secured by pledge under the applicable indenture of one share of Ware River stock and $125, principal amount, of its series C bonds for each $125, principal amount, of 5¾-percent bonds issued thereunder.

If, in any of the three cases, the exact required amount of series C bonds cannot be pledged by reason of their not being available in smaller denominations than $1,000, the necessary excess, not exceeding $1,000, principal amount, will be pledged.

[fol. 603] The exchange offer in each case is conditioned upon:

(a) The deposit by the holders on or before April 1, 1955 (or such later date to which the exchange offer may be extended) of a sufficient amount of their stock to aggregate (with Central's present holdings in the case of the Pittsfield) at least 95 percent of all of such stock outstanding, or such lower percentage thereof as Central may in its discretion determine;

(b) There being no change, prior to the effective date of the exchange offer, in the dividend policy of the company whose stock is involved either in respect of the rates of dividend or the declaration, record or payment dates; and

(c) The approval and authorization by this Commission of the acquisition by Central of control through stock ownership of the carrier corporation or company the stock of which is the subject of the exchange offer, the issue (including disposition as proposed) of the proposed certificates of deposit and collateral trust bonds, and the pledging, as part of

the collateral security for such collateral trust bonds, of the requisite principal amount of series C bonds, as proposed.

Central requests authority to issue not exceeding $37,500,000 of collateral trust 6-percent bonds in exchange for 250,000 shares of Boston & Albany stock, $377,800 of collateral trust 5¼-percent bonds in exchange for 3,778 shares of Pittsfield stock, and $937,500 of collateral trust 5¾-percent bonds in exchange for 7,500 shares of Ware River stock; together, in each case, with such additional bonds of the respective issues as may be issuable upon exchanges or to replace mutilated, destroyed, lost, or stolen bonds as provided in the indentures under which such bonds are to be issued, hereinafter sometimes referred to as the 6-percent indenture, 5¼-percent indenture, and 5¾-percent indenture, respectively, and authority to pledge initially not exceeding $37,500,000, $378,000, and $938,000, principal amount, of its series C bonds as partial security for the 6-percent, 5¼-percent, and 5¾-percent collateral trust bonds, respectively.

[fol. 604] The collateral trust bonds to be issued in exchange for shares of capital stock of the Boston & Albany, Pittsfield, and Ware River under each exchange offer that becomes effective will bear annual rates of interest of 6 percent, 5¼ percent, and 5¾ percent, respectively, payable semiannually, commencing 6 months after the date of the indenture, and will mature April 1, 1980. The bonds will be issued under and pursuant to separate indentures to be executed and delivered by Central to the Second Bank-State Street Trust Company, trustee. They will be issuable as coupon bonds, registrable as to principal, or as fully registered bonds without coupons. The coupon bonds will be dated the date of the indenture, and the registered bonds without coupons will be dated as provided in the applicable indenture. The 6-percent coupon bonds will be issuable in denominations of $1,000, $500, $100, and $50; the 5¼-percent coupon bonds in denominations of $1,000, $500, and $100; and the 5¾-percent coupon bonds in denominations of $1,000, $500, $100, and $25. The registered bonds will be issuable in denominations of $1,000 and any multiples of $1,000 authorized by applicant.

The coupon bonds and registered bonds without coupons will be interchangeable. The principal amount of bonds under each indenture (exclusive of bonds issued upon exchanges or to replace mutiliated, destroyed, lost, or stolen bonds) will be limited by the amount of stock acquired and pledged under each indenture.

Each of the proposed indentures will be in substantially similar form with appropriate variations to reflect the different (a) interest rates for the bonds, (b) denominations of coupon bonds, (c) limitations on amount of bonds issuable, (d) amounts of annual sinking-fund payments, [fol. 605] (e) redemption prices, (f) amounts of series C bonds to be pledged as part of the collateral security, and (g) amounts of series C bonds that may be released upon retirement of a given amount of bonds issued under the indenture.

It is expected that each indenture will be dated April 1, 1955, but this date is tentative and may be changed to the first day of some later month, depending on when the exchange offer becomes effective, in which case corresponding changes will be made in all dates related to the date of the indenture, including the date and maturity date of the bonds and the semiannual interest dates; and the sinking-fund redemption dates will be the same as the second interest-payment date in each year from 1956 to 1979, inclusive, and the sinking-fund payment dates will be correspondingly changed. The indenture, in each case, will contain, among other usual and appropriate provisions, provisions for a sinking fund, redemption of the bonds before maturity, and for withdrawal, release, and substitution of collateral under certain conditions. If the amount of bonds outstanding under the indenture is reduced by retirement of bonds, a part of the pledged collateral may be released, but not as large a proportion thereof as the proportion of bonds retired, so that the relative security for the bonds remaining outstanding will improve as bonds are retired. In case of merger of the lessor companies into Central, the stock of the merged lessor corporations may be released upon sub titution therefor of $200, principal amount, of Central's series C bonds for each share of such stock released.

The bonds will be redeemable upon not less than 30 days' notice at Central's option, as a whole or in part at any time on or after October 1, 1956, or for the sinking fund on [fol. 606] any October 1 from 1956 to 1979, inclusive, at their applicable optional and sinking-fund redemption prices (expressed below in percentages of principal amount) together, in either case, with accrued interest to the date fixed for redemption:

If redeemed during the calendar year	6-percent bonds		5¼-percent bonds		5¾-percent bonds	
	Optional redemption price	Sinking fund redemption price	Optional redemption price	Sinking fund redemption price	Optional redemption price	Sinking fund redemption price
1956	103½	101¾	102	101	103½	101¾
1957	103¼	101⅝	102	101	103¼	101⅝
1958	103	101½	102	101	103	101½
1959	102¾	101⅜	101⅞	100 15/16	102¾	101⅜
1960	102½	101¼	101⅞	100 15/16	102½	101¼
1961	102¼	101⅛	101⅞	100 15/16	102¼	101⅛
1962	102	101	101¾	100⅞	102	101
1963	101⅞	100 15/16	101¾	100⅞	101⅞	100 15/16
1964	101¾	100⅞	101⅝	100 13/16	101¾	100⅞
1965	101⅝	100 13/16	101⅝	100 13/16	101⅝	100 13/16
1966	101½	100¾	100½	100¾	101½	100¾
1967	101⅜	100 11/16	100⅜	100 11/16	101⅜	100 11/16
1968	101¼	100⅝	101¼	100⅝	101¼	100⅝
1969	101⅛	100 9/16	101⅛	100 9/16	101⅛	100 9/16
1970	101	100½	101	100½	101	100½
1971	100⅞	100 7/16	100⅞	100 7/16	100⅞	100 7/16
1972	100¾	100⅜	100¾	100⅜	100¾	100⅜
1973	100⅝	100 5/16	100⅝	100 5/16	100⅝	100 5/16
1974	100½	100¼	100½	100¼	100½	100¼
1975	100⅜	100 3/16	100⅜	100 3/16	100⅜	100 3/16
1976	100¼	100⅛	100¼	100⅛	100¼	100⅛
1977	100⅛	100 1/16	100⅛	100 1/16	100⅛	100 1/16
1978	100	100	100	100	100	100
1979	100	100	100	100	100	100
1980	100	—	100	—	100	—

The 6-percent bonds will be entitled to the benefits of an annual sinking fund payable on or before August 25 of each year, commencing with the year 1956 and ending August 25, 1979, in an amount equal to the lesser of (a) a sum sufficient to retire at the then applicable sinking-fund redemption price $1,000,000, principal amount, of bonds, or (b) a sum equal to 25 percent of the net income[2] of Central

[2] The indenture provides that the term "net income of the company" as used therein, for the particular year in question, shall mean the result obtained by deducting from "income available for fixed charges" of the company for

[fol. 607] for the year ended on December 31 next preceding such sinking-fund payment date, or a sum equal to 2 percent of the aggregate principal amount of bonds issued (exclusive of bonds issued upon exchanges and to replace mutilated, destroyed, lost, or stolen bonds). If and to the extent that in any year the sum payable on any sinking-fund payment date under clause (b) shall be less than the sum specified in clause (a) for such year the difference between such sums, hereinafter called the sinking-fund deficiency, shall be paid to the trustee, without interest, on the next ensuing sinking-fund payment date or dates succeeding any calendar year for which the sum specified in clause (b) shall be in excess of the sum specified in clause (a), to the extent that such excess is sufficient to meet the payment of such sinking-fund deficiency plus any and all other unpaid sinking-fund deficiencies of prior years, until all sinking-fund deficiencies are made up. Central may pay into the sinking fund in any year an amount not exceeding the sum specified for that year under clause (a) plus all then subsisting sinking-fund deficiencies for prior years even if the amount so paid shall exceed the sum specified under clause (b).

The 5¼-percent and 5¾-percent bonds will be entitled to the benefits of an annual sinking fund payable on or before August 25 of each year, commencing with the year

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such year the "fixed charges" of the company for such year, as such terms are or from time to time shall be defined in the accounting rules and regulations, or other similar regulations at the time in force, prescribed by this Commission or other governmental agency having jurisdiction. If, at any time when the calculation is to be made, such terms are not defined in the accounting regulations of this Commission or other governmental agency having jurisdiction, then the term "net income of the company" shall mean the amount obtained by deducting from income available for fixed charges, the fixed charges including the following (if not already deducted): rent for leased roads, interest on funded debt, interest on unfunded debt, and amortization of discount on funded debt, but not deducting as a fixed charge any amount for any sinking-fund payment required to be made under this indenture.

1956 and ending August 25, 1979, of a sum sufficient to retire at the then applicable sinking-fund redemption price $10,000, principal amount, of 5¼-percent bonds, and $25,000, principal amount, of 5¾-percent bonds, respectively.

Payments into the respective sinking funds may be made in cash or by delivery of bonds at the then applicable sinking-fund redemption price, or both.

[fol. 608] All moneys paid into the sinking fund for the 6-percent bonds, if $25,000 or more, or upon Central's request if less than $25,000, and all moneys paid into the respective sinking funds for the 5¼-percent and 5¾-percent bonds, will be applied to the redemption of the outstanding bonds at the then applicable sinking-fund redemption price, exclusive of accrued interest. Accrued interest payable with respect to the bonds to be redeemed for sinking-fund purposes will be paid by Central otherwise than out of sinking-fund moneys.

Central now has in its treasury, unencumbered, $166,580,000, principal amount, of series C bonds, which were issued under authority granted by our orders of March 30, 1922, June 30, 1922, December 22, 1931, and June 20, 1932, in *New York Central R. Co. Bonds,* 71 I.C.C. 354, 72 I.C.C. 104, 180 I.C.C. 155, and 184 I.C.C. 635, respectively. These bonds were issued under, and are secured by, the refunding and improvement mortgage dated October 1, 1913, made by applicant's predecessor, the New York Central & Hudson River Railroad Company, to the Guaranty Trust Company of New York, trustee, which mortgage was assumed by Central by a supplemental indenture dated June 15, 1915, and was supplemented by indentures dated February 1, 1930, and June 30, 1938, to the Guaranty Trust Company of New York and John B. Cockrum, trustees. The series C bonds are issuable as coupon bonds in the denominations of $100, $500, and $1,000, and as registered bonds in the denominations of $1,000, $5,000, $10,000, and $50,000, and such other multiples of $1,000 as the board of directors may determine; are dated October 1, 1921, bear interest at the rate of 5 percent per annum, payable semi-annually on April 1 and October 1, are redeemable before maturity as an entirety at the election of Central on any interest date at 105 percent of principal and [fol. 609] accrued interest, and will mature October 1,

2013. Some of the series C bonds were pledged as collateral security for loans as authorized by our orders. Upon payment of the loans, the pledged series C bonds were released and returned to Central's treasury. Our approval of the proposed pledging of series C bonds is required by reason of the fact that our orders authorizing the issue of those bonds, some of which are now proposed to be pledged, provided that except as therein authorized, they should not be sold, pledged, repledged, or otherwise disposed of by Central unless or until so ordered by us. Those orders did not authorize the pledging of the bonds as a part of the collateral security for collateral trust bonds, as now proposed. The series C bonds are listed on the New York Stock Exchange and the sales price thereof on November 22, 1954, ranged from a low of 84⅛ to a high of 84½.

Central states that it is necessary to pledge the series C bonds under the respective indentures as proposed in order to make the exchange offers sufficiently attractive to the stockholders by giving them, in exchange for their stock, readily marketable bonds of Central secured not only by the shares of stock exchanged therefor, but also, through pledge of series C bonds, indirectly secured by lien on the major part of its railroad properties, subject to prior liens to the extent that they attach to parts of such properties.

The proposed issue of collateral trust bonds and pledge of series C bonds are essential elements of Central's plan to acquire control of the lessor companies through ownership of their capital stock.

As previously stated, Central operates the railroad of the Boston & Albany under lease and by virtue thereof operates the railroads of the Pittsfield and Ware River [fol. 610] under leases of their properties to the Boston & Albany. Pursuant to such lease arrangements Central pays as a part of the rent for these properties cash rentals amounting annually to $2,000,000 in the case of the Boston & Albany, which is equivalent to $8 a share on its outstanding stock; $22,500 in the case of the Pittsfield, which is equivalent to $5 a share on its outstanding stock; and $52,500 in the case of the Ware River, which is equivalent to $7 a share on its outstanding stock; and, in addition,

certain taxes, including Federal income taxes of those companies, which, in the case of the Boston & Albany, are estimated to amount, at the present 52 percent rate, to about $117,000 for 1954, on income derived from investments, as well as the Federal income tax on the $2,000,000 of cash rental income amounting to $1,040,000 at the 52 percent rate. None of these cash rentals comes back to Central as dividends, except $3,610 a year representing the 5 percent dividend on the 722 shares of Pittsfield stock owned by Central.

The condensed balance sheet of the Boston & Albany, as of December 31, 1953, shows total investments $52,910,424, consisting of investment in transportation property less depreciation $46,277,541, miscellaneous physical property $600, and other investments $6,632,283; current assets $249,545; deferred assets $5,648,219, and total assets $58,808,188. Liabilities included capital stock $25,000,000, consisting of 250,000 shares, par value $100 a share, all of which are outstanding in the hands of the public; long-term funded debt unmatured $9,327,000; current liabilities $1,261,887; deferred liabilities $12,634,490; and total surplus $10,584,811, consisting of earned-appropriated $7,152,048 and earned-unappropriated $3,432,763. This carrier's income statement shows net income for the years 1944 through 1953, ranging from $2,197,668 to $2,209,983, [fol. 611] of which $2,187,500 was appropriated each year for dividends on capital stock and the balance was appropriated to surplus.

The general balance sheet, as of December 31, 1953, of the Pittsfield shows investment in road $450,000 and capital stock $450,000, consisting of 4,500 shares, par value $100 a share, of which 722 shares are held by Central and the remaining 3,778 shares are outstanding in the hands of the public. Its income statement shows net income of $22,500 for each of the years 1944 through 1953. It has no surplus. Its entire net income is appropriated for dividends on its capital stock.

The general balance sheet, as of December 31, 1953, of the Ware River shows investment in road $1,115,164 and capital stock $750,000, consisting of 7,500 shares, par value $100 a share, all of which are outstanding in the hands of

the public, and earned surplus appropriated $365,164. Its income statement shows net income of $52,500 for each of the years 1944 through 1953, all of which was appropriated for dividends on capital stock. This company's credit balance of $364,164 in earned surplus has not changed since January 1, 1944.

The foregoing income statements do not reflect taxes with respect to the income and properties of the lessor companies since under the terms of their respective leases such taxes are payable by Central on their behalf. During the 10-year period 1944 through 1953, the taxes so payable on behalf of the Boston & Albany in each year ranged from an aggregate of $3,569,203 to an aggregate of $5,078,323, of which Federal corporate income taxes ranged from $1,165,719 to $2,462,054, and other taxes ranged from [fol. 612] $2,293,531 to $3,166,033. Those so payable during that period on behalf of Pittsfield and Ware River ranged from $6,202 to $12,917 and from $25,679 to $40,968, respectively.

The yearly return on the $150, principal amount, of the 6-percent bonds to be exchanged for Boston & Albany stock would be $9 a share; on the $100, principal amount, of 5¼-percent bonds to be exchanged for Pittsfield stock would be $5.25 a share; and on the $125, principal amount, of 5¾-percent bonds to be exchanged for Ware River stock would be $7.1875 a share. For over 50 years the stockholders of these lessor companies have received annual dividends per share on their stock of $8.75, $5, and $7, respectively. The last sales price of the Boston & Albany stock on the Boston Stock Exchange prior to November 23, 1954, the date of the public announcement of the exchange offer, was $133 a share. The stocks of Pittsfield and Ware River are not listed on any stock exchange. The last reported sales prices of their stocks prior to November 23, 1954, were $73 and $105.25 a share, respectively.

It is represented that the Internal Revenue Code of 1954 now permits a railroad company to file, without paying the additional 2 percent tax previously required, a consolidated corporate income tax return, including income of subsidiaries, where at least 80 percent of the outstanding stock is owned by the reporting railroad company, and

that if Central acquires at least 80 percent of the capital stock of the three lessor companies, consolidated Federal income tax returns, including these lessor companies, may be filed. Central estimates that consummation of the proposed transactions would result in savings in the net cost to it for rental and taxes in connection with these proper- [fol. 613] ties. Such savings would be substantial in the case of the Boston & Albany, due in part to Central's receiving its stock ownership proportion of the dividends paid by the lessor companies and partly to savings in the net cost of taxes. Currently, such dividends are being paid at the annual rate of $8.75 a share by the Boston & Albany, of which $8.00 is paid from the rental income and $0.75 from income from investments, $5 a share by the Pittsfield, all of which is paid from the rental income, of which $3,610 comes back to Central as owner of 722 shares of the stock, and $7 a share by the Ware River, all of which is paid out of the rental. The tax savings would result in part from Central's being relieved from payment of the lessor companies' tax on income derived from the cash rentals under the leases, because such income would be intercompany transactions that would be eliminated in a consolidated income tax return. These savings do not take into consideration the fact that to acquire the stocks of the lessor companies, Central would have to issue its proposed collateral trust bonds in payment therefor. The interest and sinking-fund payments for premiums on the bonds would, during the life of the bonds, offset in part those savings. However, such payments would decrease each year after the first sinking-fund redemption date by reason of the reduced amounts of bonds outstanding and the reduction in the premium payable on redemption.

Assuming Central to be in the tax class each year, continuance of the present 52 percent corporate income tax rate and retirement through the sinking fund of the collateral trust bonds at the maximum rate provided for by the applicable indenture, Central estimates that the net savings after taxes in the calendar year 1955 over the [fol. 614] present arrangements, on the basis of a 100-percent exchange effective January 1, 1955, would be approximately $1,139,360 in the case of the Boston & Albany

$4,702 in the case of the Pittsfield, and $21,125 in the case of the Ware River, and $880,360, $2,469 and $15,800, respectively, on an 80-percent exchange basis. The aforementioned estimated savings of $1,139,360 and $21,125 for 1955, will be substantially offset by the estimated costs and expenses of effectuating the proposed exchange offers, and the $4,702 savings will be more than offset by such costs and expenses.

In the calendar year 1956, the estimated savings of $1,139,360 in the case of the Boston & Albany will be absorbed to the extent of $1,008,500 by the sinking-fund payment for principal and premium after taxes, assuming maximum sinking fund requirements will be applicable, indicating a net overall cash advantage in that year of about $130,860. On the basis of an 80-percent exchange (after the same sinking-fund payment) the net cash cost to Central would be about $128,500. In the same year, the estimated savings with respect to the Pittsfield and the Ware River will be absorbed by the sinking-fund payments and premiums after taxes of $10,048 and $25,210, respectively.

Each year after 1956, during the life of the collateral trust bonds, Central's interest obligations with respect to each issue of such bonds will be reduced in proportion to the amount of bonds retired through operation of the sinking fund or otherwise, and at the maturity date of the bonds, Central will also have benefited to the extent that the bonds will have been paid off. At that time, after any remaining unredeemed bonds shall have been paid off, Central will own the exchanged stock of the three lessor [fol. 615] companies unencumbered by the pledge under the indentures. Thereafter the annual savings in rentals and taxes paid on account of such rentals would apply, without deduction for any cost of interest, sinking-fund payments, or premiums on the bonds.

Central's condensed general balance sheet, as of October 31, 1954, shows the following items, among others:

Assets

Investment in transportation property less depreciation and amortization		$1,360,421,108
Capital and other reserve funds		1,015,962
Miscellaneous physical property less depreciation		31,332,098
Investments in affiliated companies		352,927,402
Other investments		46,447,397
Total investments		1,792,143,967
Current assets		155,739,092
Includes:		
Cash	$37,730,661	
Temporary cash investments	3,169,324	
Material and supplies	54,034,317	
Deferred assets		16,239,224
Unadjusted debits		8,427,626
Total assets		$1,972,549,909

Liabilities

Capital stock		$ 562,332,426
Funded debt unmatured	$527,780,500	
Equipment obligations	242,152,602	
Amounts payable to affiliated companies	53,944,542	
Total long term debt		823,877,644
Current liabilities		122,819,490
Deferred liabilities		43,233,781
Unadjusted credits		51,906,901
Surplus—		
Unearned	84,420	
Earned—appropriated	9,232,208	
Earned—unappropriated	359,063,039	
Total surplus		368,379,667
Total liabilities		$1,972,549,909

Central's income statement for the year 1953 and for the 10 months ended October 31, 1954, shows net income of $34,002,039 and a deficit of $2;664;635, respectively. Its capitalization, as of October 31, 1954, was composed of capital stock 40.57 percent and long-term debt 59.43 percent. After consummation of the proposed transactions, assuming a 100-percent exchange, its capitalization would be composed of capital stock 39.46 percent and long-term debt 60.54 percent.

[fol. 616] As of the date of the balance sheet, the applicant's capitalizable assets, determined according to the principles set forth in *Chesapeake & O. Ry. Co. Stock,* 254 I.C.C. 653 (669), and the cases cited therein, exceeded its capitalization by an amount sufficient to support the proposed issue of bonds.

Central estimates that the total expenses incurred or to be incurred in connection with the issue and disposition of the several proposed issues of collateral trust bonds will be $495,846, the details of which are set forth in the application and in the report which accompanied our order of January 14, 1955, in Finance Docket No. 18790, *supra.*

Applicants represent that the exchange offers are fair and advantageous to the stockholders of the respective lessor companies in that they offer them an opportunity to exchange their shares of stock for applicant's bonds designed to have market values and interest yields greater than the market values and dividend yields of the shares of stock for which exchanged, and to be secured in each case by the shares of stock deposited by the stockholders in acceptance of the exchange offer and, in addition, by pledge of generous amounts of the series C bonds, which, in turn, are secured by mortgage lien upon 81 percent of applicant's owned miles of railroad and on its leasehold interest in about 85 percent of the miles of road held by it under lease (subject to the prior liens, insofar as they attach) and upon some additional collateral. Applicants state it is essential that the exchange offers be advantageous to the stockholders, otherwise acceptance by the holders of 95 percent of the shares could not be expected.

The proposed transactions were authorized, subject to our approval, by resolutions adopted by Central's board of directors at a meeting held on November 23, 1954.

[fol. 617] Although the proposed issue of collateral trust bonds for shares of stock will increase the bonded debt and fixed interest charges of applicant, such increases will diminish annually, beginning in 1956, by operation of the liberal sinking-fund provisions in the indentures securing the bonds and will be more than offset by decreases in net rentals (i.e. gross rentals less the portions thereof coming back to applicant in the form of dividends) and net costs of taxes, with the result that substantial savings will result in the sum total of net rentals, taxes, and interest paid in respect of the railroads of the carriers of which control is proposed to be acquired. The amount of such savings will depend on the percentage of stock acquired as a result of the exchange offers. Net earnings of the applicant would be increased to the extent that the savings above referred to are realized and earnings available for fixed charges would be increased accordingly. The acquisition by the applicants of control through stock ownership of the properties of the three carriers now operated by the Central under lease not only will be advantageous to the latter financially, but will constitute an important intermediate step in ultimate corporate unification of such properties. Our authorizations herein should not be construed, however, as indicating in any way approval of merger of the properties of the lessor companies into Central, or any of the terms and conditions thereof.

The applicants state that the interest of carrier employees will not be affected by the proposed transactions because no material change in operation is involved and no employee will be displaced by reason thereof. However, our authorizations herein under section 5(2) of the act will [fol. 618] be subject to the same conditions with respect to protection of employees as prescribed in *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672.

Adequate transportation service to the public will not be affected by the transactions. The increase in total fixed charges indicated herein in connection with the increase in bonded debt and interest charges and the assumption of payment thereof by the Central is not inconsistent with, or contrary to, the public interest. No other railroad has sought to be included in the transaction.

In granting our approval herein it is intended that the applicant shall have full power to carry the transactions into effect and be relieved of all restraints and limitations in conformity with the provisions of section 5(11) of the act.

Subject to the conditions mentioned with respect to the protection of employees we find that acquisition by The New York Central Railroad Company, through stock ownership, of direct control, and by Alleghany Corporation of indirect control, of Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation, and Ware River Railroad Company are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest.

We find further that the proposed (1) issue by The New York Central Railroad Company of not exceeding $37,500,000, principal amount, of 25-year collateral trust 6-percent bonds in exchange for up to 250,000 shares of capital stock of the Boston and Albany Railroad Company, par value $100 a share, $377,800, principal amount, of 25-year collateral trust 5¼-percent bonds in exchange for up to 3,778 shares of capital stock of The Pittsfield and [fol. 619] North Adams Railroad Corporation, par value $100 a share, and $937,500, principal amount, of 25-year collateral trust 5¾-percent bonds in exchange for up to 7,500 shares of capital stock of the Ware River Railroad Company, par value $100 a share, and (2) pledge by The New York Central Railroad Company as partial collateral security for such collateral trust bonds of not exceeding initially $37,500,000, $378,000, and $938,000, principal amount, respectively, of its refunding and improvement mortgage 5-percent bonds, series C, due October 1, 2013, all pursuant to the exchange offers dated December 17, 1954, as aforesaid, (a) are for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) are reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

[fol. 620] BEFORE THE INTERSTATE COMMERCE COMMISSION, Division 4

Finance Docket No. 18789

BOSTON & ALBANY RAILROAD COMPANY ET AL. CONTROL

Finance Docket No. 18790

NEW YORK CENTRAL RAILROAD COMPANY SECURITIES

ORDER—March 22, 1955

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the prior report of January 14, 1955, in Finance Docket No. 18790, are hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions for protection of employees indicated in said report, acquisition by The New York Central Railroad Company, through stock ownership, of direct control, and by Alleghany Corporation of indirect control, of Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation, and Ware River Railroad Company upon the terms and conditions in said report found just and reasonable be, and it is hereby, approved and authorized.

It is further ordered, That the New York Central Railroad Company be, and it is hereby, authorized (1) to issue not exceeding $37,500,000, principal amount, of 25-year collateral trust 6-percent bonds in exchange for up to 250,000 shares of capital stock of the Boston and Albany Railroad Company, par value $100 a share, on the basis of $150, principal amount, of bonds for each share of stock, $377,800, principal amount, of 25-year collateral trust 5¼-percent bonds in exchange for up to 3,778 shares of capi-

tal stock of The Pittsfield and North Adams Railroad Corporation, par value $100 a share, on the basis of $100, principal amount, of bonds for each share of stock, and $937,500, principal amount, of 25-year collateral trust 5¾-percent bonds in exchange for up to 7,500 shares of capital stock of the Ware River Railroad Company, par value $100 a share, on the basis of $125, principal amount, of bonds for each share of stock, to be issued under and pursuant to separate indentures to be dated April 1, 1955, or such later date as may be determined, and to be executed and delivered by applicant to Second Bank-State Street Trust Company, trustee; said bonds to be dated, to bear interest, to mature, to contain redemption and sinking-fund provisions, and to be in the forms and denominations, all as set forth in the application and aforesaid report; and (2) to pledge as partial collateral security for such collateral trust bonds not exceeding initially $37,500,000, $378,000, and $938,000, principal amount, respectively, of its refunding and improvement mortgage 5-percent bonds, series C, due October 1, 2013, as set forth in the application and aforesaid report;

[fol. 621] *It is further ordered*, That, except as herein authorized, said bonds shall not be sold, pledged, repledged, or otherwise disposed of by the applicant unless or until so ordered or approved by this Commission:

It is further ordered, That, within 10 days after the execution of the proposed indentures, the applicant shall file with this Commission a certified copy of each such instrument;

It is further ordered, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C.F.R. 56); and

It is further ordered, That nothing herein shall be con-

strued to imply any guaranty or obligation as to said bonds, or interest thereon, on the part of the United States.

By the Commission, division 4.

Harold D. McCoy, Secretary.

[fol. 622] BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHESAPEAKE & OHIO RAILWAY COMPANY, PURCHASE, ETC.

Finance Docket No. 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

RESPONSE OF ALLEGHANY CORPORATION TO PETITION FOR RECONSIDERATION OF DENIAL OF PETITIONS TO INTERVENE—Filed March 28, 1955

Alleghany Corporation respectfully urges that the Application for Rehearing and Reconsideration, filed by Lewis D. and John Gilbert and by Breswick & Company, provides no reason for overturning the Orders of the Commission (Division 4) denying their prior respective petitions for leave to intervene.

I

Petitioners make no effort to meet the very threshold ground upon which Division 4 denied their petitions to intervene. The petitions for leave to intervene (filed on behalf of the Gilberts on January 11, 1955, and on behalf of Breswick & Company on February 4, 1955) set forth their interests in the proceedings in virtually identical language and asserted hardly more than that they were independent investors and stockholders in Alleghany and that the issues presented by the proceedings were of great importance to them as investors. The Commission (Division

4), in denying the petitions (that of the Gilberts by Order of February 9, 1955, and that of Breswick & Company by Order of February 15, 1955), pointed out the inadequacy of their statements as failing to disclose their particular [fol. 623] interest in the proceedings and why their intervention might be of assistance. The two orders stated:

> "That the interests of the said petitioners are not shown to pertain to the terms and conditions of the proposed merger, modification of lease, and resulting internal rearrangements of the applicants' corporate structure, and are not shown to be different from the interests of all other holders of the same classes of stock of Alleghany and Central."

On this state of the record, petitioners, in seeking reconsideration of Division 4's orders denying intervention, are clearly required to disclose how and why Division 4 erred in assaying their interests as insufficient to justify their participation. This they make no effort to do. Again, there is a complete failure to set forth how their interests pertain to the proposed transactions and how they differ from the interests of other stockholders.

It was particularly incumbent upon petitioners to disclose and develop these matters in the light of Alleghany's assertion, twice made and not contradicted, that it believed petitioners' counsel "or a person acting in concert with him, probably a disgruntled former employee of Alleghany, is attempting to use the application of New York Central and Alleghany in this matter as a basis for harrassing" them. With respect to the Gilberts, the lack of any valid interest in the proceedings was clearly apparent in that their prayer, on the merits, was that Alleghany's application be denied *or*, if granted, granted only upon condition that provision be made for cumulative voting in the election of directors. Clearly, an interest in fostering cumulative voting provides no basis for permitting their intervention in these proceedings and Division 4's Order properly pointed out that they sought a broadening of the issues beyond the Commission's jurisdiction. Annual stockholders' meetings, and not the happenstance of pending applica-

[fol. 624] tions before this Commission, provide the appropriate forum for advocating cumulative voting.

Breswick & Company filed an Amended Petition for Leave to Intervene on February 18, 1955, or after its initial petition to this end had been denied. The Commission (Division 4) properly dismissed this Amended Petition since the prior order had left nothing pending before the Commission to amend. In this attempted "Amended" petition, Breswick & Company again avoided making any statement or disclosure of its interest in these proceedings and assigned no reasons from which the Commission might have concluded that its participation could be helpful.

For the reasons set forth above, we respectfully submit that Division 4 did not err in refusing to permit petitioners' requested intervention. And this, it is proper to emphasize, is all that may properly now be brought before the Commission. There can be no issue here as to the propriety of Division 4's Order of March 2, 1955, approving the several applications involved in the proceedings. The sole present issue is as to the earlier orders refusing to permit petitioners' requested intervention.

II

On the particular reasons assigned by petitioners, we shall make only brief comment. For the convenience of the Commission we set forth in full these reasons, followed by our comment.

> 1. The orders denying intervention are arbitrary, capricious and unreasonable, because the March 2, 1955 report of Division 4 takes cognizance of the issues raised by said petitions and discusses them at length and decided them on the merits.

It is a remarkable argument that the denial of intervention became arbitrary because the Commission considered and decided on the merits all the issues the would-be inter- [fol. 625] veners sought to inject. Petitioners here cut the ground from under themselves. How can petitioners complain of the denial of intervention if, by their own state-

ment, Division 4 took cognizance of the issues they raised, considered and decided them?

> 2. The effect of the March 2, 1955 report and order, if final and not set aside, will be to transmute applicants' stock in Alleghany Corporation from that in an investment company, as defined by the Investment Company Act of 1940, into that in a carrier, as defined by the Interstate Commerce Act. Such a result will deprive said stock of valuable rights and privileges.

It is fallacious that Division 4's March 2 Report and Order alters the status of Alleghany from that of an investment company to that of a carrier. Alleghany has been a carrier since June 5, 1945, pursuant to the plain command of the Commission's Order of that date in Finance Docket No. 14692 (and, since March 2, 1955, by the Order of that date). Division 4's Report and Order points out (Sheet 8) that the 1945 Order denominated Alleghany a carrier unless and until otherwise ordered, and that only a further Commission order (and no unilateral act of Alleghany) could alter this status.

> 3. The intervention of the S.E.C. herein is limited to urging the Commission to deny Alleghany's application as a matter of discretion, while applicants here urge denial on the basis of absence of statutory power and violation of the Investment Company and Interstate Commerce Acts.

It is not a basis for intervention that the would-be intervener has different views on the applicable law and the issues from those of another intervener. Division 4 held these interveners had no such interest as would permit them to intervene. There is no possible relationship between their standing to intervene and the fact that their views differ from those of S.E.C. Moreover, by their own account in Point I, the issues they desired to raise were all determined.

> [fol. 626] 4. That no broadening of the issues is sought.

Petitioners' mere assertion that they seek no broadening of the issues should carry no weight. The most cursory examination of their pleadings discloses that Division 4 was correct in holding the contrary. For example, the pleading of the Gilberts raises the completely extraneous issue of cumulative voting. The pleading of Breswick & Company renewed even such stale (and decided) charges as that The Chesapeake and Ohio Railway Company, Clinton W. Murchison, and Sid W. Richardson participated with Alleghany officers in effectuating the management of two or more carriers in a common interest, contrary to law.

> 5. That for the reasons set forth in the petitions for intervention and amended petition and supporting statements, and which are overruled by the March 2, 1955 Report and Order, the application of Alleghany Corporation herein should be denied or dismissed.

Here petitioners are arguing, not the propriety of the denial of their requested intervention, but the propriety of an order in a proceeding to which they are not parties. The correctness of the March 2 Report and Order may not be put in issue by petitioners unless and until they are permitted to intervene as parties. Their several pleadings have disclosed only a motivation to harrass Alleghany, and no legal interest or standing qualifying them to participate in the proceedings.

> Respectfully submitted, Alleghany Corporation, By Edward K. Wheeler, Its Attorney.

March 28, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 627] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 628] BEFORE THE

INTERSTATE COMMERCE COMMISSION

APPLICATIONS OF ALLEGHANY CORPORATION

Finance Docket Nos. 18866 and 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD CO. MERGER

Finance Docket No. 18656

PETITION FOR LEAVE TO INTERVENE IN F.D. No. 18866 AND APPLICATION FOR REHEARING AND RECONSIDERATION IN NOS. 14692 AND 18656—Filed March 28, 1955

Come now Lewis D. and John Gilbert and Randolph Phillips, record or beneficial owners of common stock of The Alleghany Corporation, and hereby respectfully represent that they have an interest in the above entitled matters, and desire to intervene and become parties thereto.

In support of this petition, petitioners respectfully allege:*

1. That the Report and Order of this Commisison by Division 4, dated March 2, 1955, in F.D. Nos. 14692 and 18656 insofar as they purport to confer carrier status upon Alleghany Corporation, or to continue said status from January 19, 1954 to date, under Section 5(3) of the Interstate Commerce Act, are without authority in law or fact, and therefore this Commission has no jurisdiction over the application in No. 18866.

[fol. 629] 2. That the issuance of the Convertible 6% Preferred Stock, the proposed offer of exchange of said stock for Series A 5½ Preferred Stock and the proposed issuance of new and additional shares of common stock, are not for lawful objects within the corporate purposes of Alleghany Corporation and are not compatible with the public inter-

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* The application for rehearing, etc. in Nos. 14692 and 18656 is made herein only by Phillips, the Gilberts already having filed such an application on March 21, 1955.

est; are unfair and inequitable to the holders of the common stock, will dilute the equity of said common stock, and deprive it of other rights, and will result in unjust enrichment of the holders of the Series A Preferred stock.

3. That this Commission should test the proposals by the standards of fairness, feasibility and propriety established by Congress in the Investment Company Act of 1940, since Alleghany Corporation concedes that, except for the alleged operation of Section 3(c)(9) of said Act, it is an investment company within the meaning of said Act, and for the further reason that said Act "in effect codifies the fiduciary obligations placed upon officers and directors of investment companies." *Aldred Inv. Trust* v. *S.E.C.*, 151 F. 2d 254.

4. That the common stockholders have not been protected by arms-length bargaining between persons owning or representing only common stock and dedicated solely to their interests and the owners or representatives of the other classes of securities affected by the proposed transactions, and the terms of the transactions have been imposed solely by management interests under the domination and control of Robert R. Young, whose dollar investment, with that of his wife, in the preferred stocks far exceeds that in the common stock.

[fol. 630] 5. That the common stockholders, as a result of the dilution of their rights contemplated by the transactions in question, will if such transactions are consummated, not receive a fair and just return on the present value of their investment.

6. That the public interest and the interest of the stockholders will be subverted by the creation of an unnecessarily complex capital structure, consisting of two or three classes of preferred stock, bank debt, debentures, warrants and common stock, and will thus constitute an unnecessary manipulative device, and will lack adequate provisions to protect the voting control, rights and equity of the common stockholder.

7. That the issuance of the Convertible 6% preferred stock is not necessary, and that the Corporation should devote its available resources to the redemption and retirement of the Series A preferred stock instead of making new

investments and extending the risk of the common stock's equity.

8. That the fairness and feasibility of the transactions herein contemplated depend upon a continuing upward trend in the securities markets for a prolonged period of time and that there is no evidence in the record to support the probability of such a trend.

Wherefore, petitioners ask that they be admitted herein with the full rights of parties, that the applications of Alleghany Corporation under Sections 5(3) and 20(a) of the Act be dismissed or denied, and if not dismissed or [fol. 631] denied, that the applicant Alleghany Corporation be required to support its applications by sworn evidence, subject to cross-examination.

Respectfully submitted by Joseph B. Hyman, Attorney for petitioners Gilbert, 211 South Pitt Street, Alexandria, Va.; Randolph Phillips,* Pro Se, 53 East 74th Street, New York 21, N. Y.

March 23, 1955.

[fol. 632] AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss.:

Randolph Phillips, being duly affirmed, hereby deposes and says that he has read the foregoing petition for leave to intervene and the application for rehearing and reconsideration and that all the statements in said petition and application are true to the best of his knowledge, information and belief.

Randolph Phillips.

Affirmed to before me this 23rd day of March, 1955, Mary J. Groen.

Mary J. Groen, Notary Public, State of New York, No. 41-1580500. Qualified in Queens County. Certs. filed with County Clerks and Register's Office Kings and New York County. Commission expires March 30, 1955.

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* See attached affidavit.

[fol. 633] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 634] BEFORE THE

INTERSTATE COMMERCE COMMISSION

APPLICATIONS OF ALLEGHANY CORPORATION

Finance Docket Nos. 18866 and 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD CO. MERGER

Finance Docket No. 18656

OPPOSITION OF ALLEGHANY CORPORATION TO PLEADING OF THE GILBERTS AND PHILLIPS—Filed April 20, 1955

Comes now Alleghany Corporation and respectfully prays that the pleading (styled a "Petition for Leave to Intervene in F. D. No. 18866 and Application for Rehearing and Reconsideration in Nos. 14692 and 18656"), filed on March 29, 1955 by Lewis D. and John Gilbert and Randolph Phillips, be rejected for filing, and returned to the petitioners without consideration, as failing to comply with relevant standards of the Commission's General Rules and Regulations.

As to Finance Docket Nos. 18656 and 14692

1. The pleading is clearly abortive insofar as it seeks rehearing and reconsideration of the Commission's Order in these proceedings. The Gilberts have concededly exhausted their power to plead and do not join in this portion of the petition. As to Phillips, it is enough to note that he is not a party to these proceedings and has never sought to become a party to them. He is without any right to ask, thus belatedly, for rehearing and reconsideration.

[fol. 635] As to Finance Docket No. 18866

2. The petition for leave to intervene in this proceeding is filed far out of time and may not be considered, in the absence of a showing of good cause for the belated filing. Alleghany's application herein was filed February 18, 1955, and the plain dictate of Rule 56.3(d) of the Commission's Rules allowed petitioners only 15 days (or until March 5,

1955) to seek intervention. This provision reads that "Petitions for leave to intervene may be filed by persons interested in the application within 15 days after the filing thereof . . . but not after, except for good cause shown . . ."*

3. The imposition of the 15-day period is not happenstance, to be lightly disregarded. The Commission was patently aware that, with respect to the proposed issuance of securities, time is usually of the essence, and it therefore laid down very detailed rules governing the procedures to be followed in considering applications for the issuance of securities. Among the requirements is Subsection (c) of Rule 56.3, providing that the governors of each state in which the applicant is incorporated or does business must be notified of the application and served with a copy of it. The subsection continues, in paraphrase, that such notice to the states must include a request that the Commission be notified, *within 15 days after the filing of the application*, if the state desires to make representations or be heard. [fol. 636] It would be difficult to justify limiting states to a 15-day period within which to act, while according these particular petitioners, not 15 days, but 39 days.

4. Petitioners offer no single word in an effort to establish that there is "good cause" for their very late filing. It is entirely clear that petitioners were well aware of the filing of the application (were, indeed, aware a month before its filing that it would be filed), and are in no position to excuse their tardiness. The following facts are relevant:

(a) All stockholders of Alleghany were sent a proxy statement under covering letter dated January 14, 1955, giving details of the exchange offer and stating that, if the stockholders approved, an application to the Commission "will be made as soon as practicable following such action of the stockholders."

(b) Petitioners appeared at the special meeting of Alleghany stockholders held in Baltimore, Maryland, and voiced their opposition to the proposed action. The proposed exchange offer was nevertheless approved by

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* The first elided portion states the requirements as to timeliness in instances where a hearing is ordered—obviously a situation having no application here.

a vote of 3,269,217 to 77,623. (See Exhibit II-a, p. 12 of Alleghany's application.)

(c) Joseph Hyman requested of Alleghany's counsel in late February a copy of the application herein. Hyman has been counsel of record for the Gilberts [fol. 637] and Breswick & Company in filing pleadings directed against the applications in Docket Nos. 14692 and 18656. Hyman's knowledge may be fairly imputed both to the Gilberts and to Phillips who has stated that he has been retained by the Gilberts and Breswick & Company in respect of the exchange offer.

5. Even were the petition timely filed, it sets forth no basis upon which intervention would be justified. It is a three-page statement of charges, and not facts.* To the contrary, Alleghany in its proxy statement which comprised a total of thirty-one single spaced printed pages set forth at length all of the facts with reference to the transaction. This statement was submitted to the SEC and their suggestions were reflected in the final document sent to all stockholders. Additionally, Alleghany's application which with exhibits totaled over one hundred pages considers exhaustively the impact of the plan, particularly in terms of [fol. 638] its relative fairness to the several classes of stock, and there is no good occasion to require Alleghany to refute what is intended only to harrass, impede, and

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* The statement deals in generalities. The exchange offer is said to be "not compatible with the public interest," "unfair and inequitable"; will deprive the common stock "of other rights." The vague charge is made that the terms were imposed by "Robert R. Young, whose dollar investment, with that of his wife, in the preferred stocks far exceeds that in the common stock." If Mr. Young, having interests in both classes of stock, happened to have the greater interest in common stock, the charge of unfairness in favor of preferred over common would undoubtedly have been turned about. Petitioners might have pointed out that Mr. Allan P. Kirby, Alleghany's president, owns 516,000 shares of common stock and warrants to purchase 226,340 shares.

obstruct. In *In the Matter of Electric Bond and Share Company*, 25 S.E.C. 697 (1947), a common stockholder of a company, seeking approval of a sale of portfolio securities, charged that the sale was unnecessary and the stock had been deliberately manipulated. The Securities & Exchange Commission pointed out that the objector had hurled charges but adduced no facts, and, in words fully applicable here, concluded that to grant the objector's request for a hearing "would result in unwarranted expense and would open an avenue for obstruction and delay to the prejudice of parties to the proceeding."

6. Alleghany has spent over $100,000 in connection with this exchange offer, which costs will be wholly unrecoverable if the exchange offer is not consummated. Petitioners have had ample opportunity to express their views, yet they delayed filing their petition for leave to intervene until the very last minute. Petitioners realize that time is of the essence and their calculated delay in filing their petition is solely for the purpose of harassing Alleghany and prejudicing the success of the exchange offer by delaying Commission action upon it. The granting of this petition would only result in the imposition of still further expense on Alleghany directly contrary to the best interests of its stockholders who have given their overwhelming approval to the proposals upon which the proposed exchange offer is predicated.

Respectfully submitted, Alleghany Corporation, By Edward K. Wheeler, Its Attorney.

April 1, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 639] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 640]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket Nos. 18,656 and 14,692

PETITION OF S.E.C. FOR RECONSIDERATION—Filed April 1, 1955

Comes now your petitioner, the Securities and Exchange Commission, intervenors, and respectfully seeks reconsideration by the entire Interstate Commerce Commission of the Report and Order issued in these proceedings by its Division 4 on March 2, 1955, and as grounds therefor states:

1. The Securities and Exchange Commission ("SEC") is the agency of the United States Government charged with the administrative and regulatory responsibilities in respect of investment companies pursuant to the provisions of the Investment Company Act of 1940. Alleghany Corporation ("Alleghany") one of the applicants in the proceedings herein, by order of the SEC dated October 4, 1945 was found to be excepted from the definition of an investment company under the Investment Company Act pursuant to the provisions of Section 3(c) (9) thereof as a company subject to regulation under the Interstate Commerce Act. This SEC order was in turn based upon an order of the Interstate Commerce Commission ("ICC") in Finance Docket #14,692, dated June 5, 1945; which declared Alleghany Corporation to be deemed a "carrier" subject to certain provisions of the Interstate Commerce Act. Alleghany's application in the instant proceedings contained a request, among others, that the ICC enter an order containing the condition that Alleghany shall continue to be considered a "carrier" subject to such provisions of the Interstate Commerce Act.

The SEC, believing that the overall legislative policy expressed by the Congress in the Investment Company Act

and the Interstate Commerce Act would best be served by a revocation of the ICC order of June 5, 1945 and a denial of the request of Alleghany that it continue to be deemed a "carrier" subject to provisions of the Interstate Commerce Act, submitted to the ICC a Memorandum and Supplemental Memorandum, setting forth its views and the reasons therefor. Copies of the Memorandum and Supplemental Memorandum are attached for the convenience of the ICC.

[fol. 641] The SEC believes that the question presented in its Memorandum and Supplemental Memorandum is of sufficient importance to warrant its consideration by the entire Interstate Commerce Commission.

2. The SEC considers that the ICC has discretionary power in this matter although it would seem that the Report of Division 4 holds to the contrary. (Sheet 16.) The SEC submitted its suggestion in reliance upon Section 5(3) of the Interstate Commerce Act which provides that a non-carrier authorized by order of the ICC to acquire control of two or more carriers shall "to the extent provided by the Commission in such order" be deemed a carrier subject to certain specified regulatory provisions of the Act. The SEC's Supplemental Memorandum pointed out that the ICC has itself considered Section 5(3) of the Act discretionary and referred to ICC decisions so holding. Under the circumstances the SEC does not view its suggestion as an alteration of the effect of provisions of the Interstate Commerce Act or the Investment Company Act. (Sheet 16.)

3. Upon the assumption that Section 5(3) is discretionary, it is submitted that the Report of Division 4 does not accord sufficient weight to the points raised by the SEC as to the public interest under the two statutes involved.

a. The Report states (Sheet 16) that Alleghany's ". . . influence on the national transportation system which we regulate is immediate in effect and wide in scope. We do not think we should deprive ourselves of information necessary to the regulatory process and of value to the public generally . . ." The Report does not specify, however, in what respect the ICC would be "deprived" of information. The SEC Memorandum called attention to the detailed reporting requirements under Regulation S-X promulgated

under the Investment Company Act of 1940 to which Alleghany would be subject (SEC Memorandum, pages 20-21). Such reports would, of course, be available to the ICC as well as to the public generally.

b. The Report states that the diversification of Alle- [fol. 642] ghany's holdings is not of substantial importance, but that the important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is the ICC's responsibility. The implication of this statement is that to follow the SEC's suggestion would in some way be an abrogation by the ICC of its statutory responsibilities with respect to New York Central Railroad Company or Alleghany. The SEC, in its Memorandum and Supplemental Memorandum pointed out that even if Alleghany were not subject to the accounting, reporting and securities regulation of the Interstate Commerce Act, the ICC would, nevertheless, continue to exercise its full jurisdiction over the New York Central Railroad Company and over any acquisition by Alleghany subject to Section 5 of the Interstate Commerce Act; and that it was not necessary for the ICC to subject Alleghany to these requirements of the Interstate Commerce Act in the light of the requirements of the Investment Company Act concerning the same subject matter. The SEC, answering contentions of Alleghany, suggested means by which alleged confusion and duplication of regulation could be avoided.

4. The Report of Division 4 does not give sufficient significance to the business of Alleghany which is, and has been for some years, that of an investment company, as shown in the Memorandum and Supplemental Memorandum of the SEC. Thus, the Report states (Sheet 16): "In our opinion the diversification of Alleghany's holdings as between railroad and non-railroad or non-controlled railroad securities, is not of substantial importance." We respectfully submit that Division 4 should have considered the primary business of Alleghany Corporation in the exercise of its discretion under Section 5(3) of the Interstate Commerce Act.

The Report of Division 4 does state "The record also shows that Alleghany's investment portfolio for the future

probably will consist of railroad securities." The facts as they exist, however, should be controlling. In this connection Alleghany asserted that its portfolio at November 30, 1954 totalled $70,855,000 on a cost basis, composed of 67.7% ($48,000,000) railroad securities, 7.78% ($5,500,000) non-railroad securities, notes receivable 24% ($17,000,000) and [fol. 643] cash 0.44% ($313,000). It also asserted that it expects to maintain in rail securities not less than 75% of the portfolio. (Sheet 5) In fact, however, Alleghany's unaudited balance sheet at November 30, 1954 discloses that its portfolio, on a cost basis, aggregated $79,855,000 including $26,000,000 of notes receivable rather than $17,000,000. These figures include $31,000,000 as the cost of Missouri-Pacific Railroad common stock against which Alleghany carries a reserve on its books of $29,000,000 and which had a market value of $3,712,000, and also includes the Investors Diversified Services, Inc. common stock at $1,455,000 although it had a market value of $27,113,000. On a value basis, which we conceive to be the appropriate basis for viewing the primary business of Alleghany, this same portfolio aggregated $79,527,000, comprised as follows: 18.4% ($14,646,000) in controlled railroads securities and 81.6% ($64,881,000) in investment securities, the latter consisting of Missouri-Pacific Railroad securities of $7,036,000 (8.9%), Investors Diversified Services, Inc. stock of $27,113,000 (34.1%), other corporate securities of $4,716,000 (5.9%) and notes receivable of $26,016,000 (32.7%).

As also shown in the SEC Memorandum (page 12) Alleghany's investing activities indicate that its primary business is that of an investment company.

5. The Report states (Sheet 16) that "The SEC has not offered for our consideration any specific terms or conditions to be imposed as a matter of protecting the public interest, in the event we should determine that Alleghany continue its status as a carrier subject to the Act." The SEC, in its Memorandum and Supplemental Memorandum, concluded that registration under the Investment Company Act by Alleghany would best serve the public interest and the interest of investors.

If the ICC is of the view that it may impose terms and conditions which, in lieu of registration under the Invest-

ment Company Act, would require conduct by Alleghany in conformity with the standards of that Act, and the rules promulgated thereunder, the SEC is prepared to make recommendation in that respect upon request. It is pointed out, however, that as shown in our Memorandum, the regulation by the SEC of purchases and sales between affiliated persons of registered investment companies and such investment companies, and the necessity for obtaining the SEC's approval prior to carrying out any such transactions, might be said to be outside the possible scope of any ICC order.

[fol. 644] Wherefore, the Securities and Exchange Commission prays that the entire Interstate Commerce Commission reconsider the Report and Order issued in these proceedings by its Division 4 on March 2, 1955.

Securities and Exchange Commission, By Thomas G. Meeker, Assistant General Counsel.

[fol. 645] *Duly sworn to by Thomas G. Meeker, jurat omitted in printing.*

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 646] BEFORE THE

INTERSTATE COMMERCE COMMISSION

APPLICATIONS OF ALLEGHANY CORPORATION

Finance Docket Nos. 18866 and 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE & RAILROAD CO. MERGER

Finance Docket No. 18656

AMENDED PETITION OF BRESWICK & CO., ET AL, FOR LEAVE TO INTERVENE IN FINANCE DOCKETS NOS. 14692, 18656, AND 18866; AND AMENDED PETITION FOR RECONSIDERATION IN NOS. 14692 AND 18656—Filed April 11, 1955

Come now Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, record or beneficial owners of com-

mon stock of the Alleghany Corporation, and hereby request leave to amend their previous petitions to intervene in each of the above-entitled proceedings, and their previous petitions for reconsideration of the orders denying intervention and their previous petitions for reconsideration of the report and order dated March 2, 1955, in F.D. Nos. 14692 and 18656, so as to include the following additional allegations and prayer:

1. That by an opinion dated April 6, 1955 in Breswick & Co., et al., v. Alleghany Corporation et al., Civil Action 98-371, the United States District Court, S.D.N.Y. (per Walsh, D.J.) ruled that the interests of plaintiff Breswick and other owners of Alleghany common stock similarly situated "in proceedings under § 5 and § 20a of the Interstate Commerce Act *must be considered and protected by the Commission.*" (Our emphasis.) A copy of said opinion is attached as Appendix A hereto. (See p. 5 thereof.)

[fol. 647] 2. That said opinion rules that petitioners have a right as a matter of law to intervene in these proceedings "to challenge the jurisdiction of the I.C.C. They cannot be estopped by management's acquiescence to unauthorized regulation." (p. 6)

3. That Alleghany is bound by this ruling of the Court, which ruling was made as a result of decision of a motion by plaintiffs therein for a preliminary injunction which was denied after Alleghany represented to the Court that plaintiffs had not exhausted their administrative remedy before this Commission.

4. That the opposition of Alleghany to the petitions herein is inconsistent with the aforesaid representations of Alleghany to the District Court and is not in good faith, in that Alleghany failed to disclose to the Commission the pendency of said motion before the District Court and the representations of Alleghany with respect thereto, and in that Alleghany also failed to disclose that there has been in existence since March 4, 1955 a temporary restraining order of said Court restraining "until the determination of the motion (for preliminary injunction) the defendant Alleghany Corporation, and its attorneys, directors, agents and employees from issuing said new 6% Convertible Pre-

ferred Stock," which issue is the subject matter of F.D. No. 18866,

5. That the existence of said restraining order and the fact that said motion was *sub judice* was "good cause" for not filing petitions to intervene in No. 18866 until more than 15 days after the filing of the application therein. Had [fol. 648] said motion for injunction been granted the proceeding in No. 18866 would have been a nullity and this Commission would have been spared the task of passing upon the application.

6. Petitioners also request a hearing in 18866, and that Alleghany be required to support said application by evidence of its Chairman, President or Vice President. Obviously until this Commission determines whether or not to hold a hearing said petitions are timely within the meaning of the rule.

7. That each and every petitioner herein hereby seeks to intervene in Nos. 14692 and 18656 on the grounds and for the reasons set forth in the petitions for intervention filed on January 11, 1955, February 4, 1955, February 21, 1955 and March 29, 1955.

8. That, to the extent any order of Division 4 denies said applications, said order should be overruled by the full Commission.

9. That the Court pointedly observed in its opinion of April 6, 1955: "Division Four gave no consideration to plaintiffs' contention that Alleghany has no control of the individual members of the board of Central." (p. 3, f. n. 1) That this issue of fact, unless conceded, can only be determined by this Commission after a full hearing thereon and the sworn testimony of the members in question, and that the report and order of March 2, 1955 are invalid by failure to determine this issue; and that for this and other reasons previously given the March 2, 1955 report and order should be reconsidered by the full Commission and the application [fol. 649] of Alleghany denied or dismissed.

Wherefore, petitioners respectfully move this Commission, or Division Four, to issue an order permitting them to intervene, with the full rights of parties, in Finance Docket Nos. 14692, 18656, and 18866; that the full Commission reconsider the orders of Division Four denying

intervention herein and reverse said orders; that the full Commission reconsider the report and order of March 2, 1955 and reverse and set aside said report and order insofar as they grant the application of Alleghany Corporation in Finance Docket Nos. 14692 and 18656, and that said application and the application in Finance Docket No. 18866 be denied or dismissed for lack of jurisdiction, and if not so denied or dismissed, they be set for hearing and that Alleghany Corporation be directed to support said applications by sworn evidence of it and New York Central's responsible directors and officers, subject to cross-examination.

Respectfully submitted by George Brussel, Jr., Attorney for petitioner Breswick & Co., 141 Broadway, New York, N. Y.; Joseph B. Hyman, Attorney for petitioners Gilbert, 211 South Pitt Street, Alexandria, Va.; Randolph Phillips,* Pro Se, 53 East 74th Street, New York 21, N. Y.

April 8, 1955.

[fol. 650] BEFORE THE

INTERSTATE COMMERCE COMMISSION

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Finance Docket No. 18,656

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Finance Docket No. 14,692

REPLY OF ALLEGHANY CORPORATION TO SEC PETITION FOR RECONSIDERATION—Filed April 13, 1955

Comes now Alleghany Corporation, an applicant in the subject proceedings, and respectfully replies to the untitled pleading of the Securities and Exchange Commission which states that it seeks reconsideration of the Report and Order issued herein by Division 4 on March 2, 1955. Alleghany

* See attached affidavit.

initially observes that, while the SEC prays for reconsideration of the Report and Order, its pleading takes issue only with so much of it as provides for the continuance of Alleghany as a carrier, subject to specified provisions of the Interstate Commerce Act.

1. The SEC, in lieu of restating its contentions previously placed before Division 4, attaches to its present pleading copies of its Memorandum of September 14, 1954, and its Supplemental Memorandum of December 14, 1954. Its present pleading is hardly more than a brief summarization of the arguments heretofore advanced in its two earlier memoranda, plus a statement of disagreement with the conclusions reached by Division 4. In these circumstances, it seems inappropriate for Alleghany to do more than attach copies of its replies to the two SEC memoranda, and to summarize the issues, giving Alleghany's position with respect to them.

[fol. 651] 2. The question as to which of two federal agencies should regulate Alleghany is manifestly one which must be answered in strict conformity with Congressional intention. If, as we assert and Division 4 concluded, Congress intended the ICC to regulate Alleghany, then the ICC has no discretion to yield its jurisdiction to the SEC. The legislative history of Section 5(3) of the Interstate Commerce Act which requires this Commission to continue regulation of Alleghany* is set forth in our memoranda attached as Appendices I and II. In summary, the legislative history discloses the following:

The Interstate Commerce Commission had since 1930 expressed concern to Congress that its regulatory power over rail carriers was inadequate so long as it lacked authority over railroad holding companies. Alleghany was

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* Section 5(3) provides that, whenever a person not a carrier is authorized by order of this Commission to acquire control of one or more carriers, "such person thereafter *shall*, to the extent provided by the Commission in such order, *be considered as a carrier* subject to such of the following provisions as are applicable to any carrier . . ."—proceeding with a listing of more than a score of provisions of the Interstate Commerce Act. (Emphasis supplied)

specifically named as the type of company which should be brought within the confines of Commission regulation since it undertook, as a management holding company, to manage and control the affairs of a major rail carrier. Congress agreed with this view and, in 1933, directed (in the language quoted in the preceding footnote) that the Commission consider such companies as carriers and regulate them.

The background to Congressional action, including the language of Congressional committees, makes clear the Congressional intent that this Commission should regu- [fol. 652] late railroad management holding companies and forecloses the argument that Congress merely empowered such regulation if this Commission felt it opportune or expedient in particular cases. The intent of the ICC recommendations and the Congressional reports make it clear that it would be an abuse of discretion for the ICC to discontinue to regulate Alleghany so long as it controls New York Central.*

When Congress later passed the Investment Company Act providing for regulation by the SEC of investment companies, it recognized that railroad holding companies such as Alleghany were subject to regulation by the ICC and should not be regulated by two agencies. Congress indicated its belief that attempted joint regulation by both the ICC and the SEC might breed unseemly conflict and confusion between federal agencies, not to mention the extreme vexation and frustration that would be visited upon any company unfortunate enough to be subjected to double-barrelled regulation. It therefore provided in Section 3(c)(9) that "any company subject to regulation under the Interstate Commerce Act" is exempt from SEC regulation.

This legislative history, given in detail in the attached memoranda but much foreshortened here, provides a clear and unmistakeable answer to the problem at hand. This Commission asked for and received a mandate from Con-

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* Alleghany Reply of October 14, p. 2 ff. Attached as Appendix I and Alleghany Reply to SEC Supplemental Memorandum, p. 2 ff. attached Appendix II.

gress to regulate railroad management holding companies. [fol. 653] In the case of this request for legislation and the Congressional direction to this Commission to regulate companies such as Alleghany, the SEC now urges that the ICC has discretionary power to refuse to regulate. Its argument is based on the underscored clause of Section 5(3) providing that a person controlling a carrier "shall, *to the extent provided by the Commission in such order,*" be considered a carrier, etc.

In our view, the SEC misreads this provision* and fails to give due attention to its legislative history. Even were the legislative history not persuasive to the contrary, the contention of the SEC is without significance in this case. Even if this Commission has discretionary authority to refuse to regulate some railroad management holding companies where the controlled railroad is small and only an incidental aspect of the company's holdings, this Commission must exercise its discretion in a reasonable manner. It has no authority to abdicate its statutory responsibilities and reach the capricious conclusion that it ought not to regulate Alleghany, a railroad management holding company whose dominant and compelling interest is control and management of the nation's second largest transportation system.

3. Common sense also dictates that this Commission, not the SEC, should regulate Alleghany. Clearly, this Commission has the greater concern with Alleghany affairs and [fol. 654] the greater responsibility to discharge. Alleghany now controls the second largest rail system in the country, and this Commission's continuing responsibility

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* The emphasis properly falls on the word "shall" and the net of the provision is that the Commission "shall" consider a railroad management holding company as a carrier. The provision continues that the quasi-carrier shall be subject to such of some twenty listed provisions of the Interstate Commerce Act as are applicable. The qualifying clause commencing "to the extent provided by the Commission" endows the Commission with needful discretionary power to subject the "carrier" to some but not all of these various provisions, as circumstances warrant.

for the soundness and conduct of this great system would far exceed any occasional, sporadic responsibility of the SEC to supervise isolated transactions of Alleghany in the interest of a relatively small number of investors whose interests this Commission has fully protected in the past. Moreover, this Commission has the specialized knowledge which attaches to its jurisdiction over the transportation field. The SEC, on the other hand, has a generalized knowledge and jurisdiction over the fiscal affairs of investment companies generally, whether in the manufacturing, mining or other unrelated field. It wastes expertise, and is contrary to accepted standards, to subject this specialized company to the regulation of an agency having a general jurisdiction rather than the agency having the specialized jurisdiction and knowledge in the particular field.

4. Prior to the instant proceedings there has been no previous disagreement with the views here expressed. In 1945, when Alleghany was authorized by this Commission to control The Chesapeake and Ohio Railway Company, Alleghany was, as an incident of the grant and without dissent, required to assume the status of a carrier and subject itself to regulation by this Commission. The SEC promptly held that, the ICC having assumed regulation, Alleghany was exempt from the Investment Company Act. In 1954 Alleghany yielded up control of C & O, but substituted control of The New York Central—a carrier which is much larger than the C & O. This Commission's 1945 determination, requiring Alleghany to assume carrier [fol. 655] status when in control of C & O, is applicable and more compelling now. There is more, not less, reason to reach the same determination when control of Central is involved. Moreover, the Commission's determination with respect to Alleghany in 1945 fully accords with its determinations as to other similar holding companies, as noted by Division 4 in the cases cited at Sheet 16.

5. It is very difficult to see how continued regulation of Alleghany by this Commission will operate to the prejudice of the SEC in the administration of its duties. This Commission has recognized that transportation has far-reaching effects, and its doors have always been open to other federal departments and agencies. Such federal instrumentali-

ties as the Department of Agriculture, the Department of Defense, the Tennessee Valley Authority, and even the United States itself, through the Department of Justice, are frequent interveners in proceedings before this Commission. Certainly, the SEC might have in the past, and may in the future, make such representations to this Commission respecting matters of particular concern to it as may be felt desirable. It may do precisely what it has done here—intervene in a proceeding which, to a major extent, involves the proposed merger of two carriers and the intricacies of the transportation field, and state its views upon the issues of concern to it.

The SEC is, as it seems to us, improperly critical of Division 4's reasoning that Alleghany's "influence on the transportation which we regulate is immediate in effect and wide in scope," and that, consequently, the Commission should be careful to keep itself informed on Alleghany's affairs. The SEC suggests that this Commission could gain [fol. 656] adequate information about Alleghany's affairs by examining such reports as the SEC would require, were it to regulate Alleghany. This argument cuts both ways. The ICC also requires reports, which are open to the SEC and from an examination of which the SEC could obtain information necessary for it to present its views. The key to Division 4's reasoning was, of course, that Alleghany's influence in the transportation field was such as to give this Commission the greater concern with its affairs, and therefore to make it the logical regulatory agency, as well as the logical repository for Alleghany reports.

6. The SEC continuously reiterates that Alleghany's primary business is investment, rather than management of controlled rail carriers. Division 4's opinion on this aspect of the argument is (Sheet 16) that the relative percentage of Alleghany holdings in rail and non-rail investment is not of substantial importance but that what is important is Alleghany's management control of the second largest rail system. We agree with this view, which accords with the legislative history* but we desire to make brief

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* See Appendix II, pp. 3, 5 (footnote).

traverse of the SEC's contention. It is primarily pegged on its emphasis upon the present value of Alleghany's holdings in Investors Diversified Services, Inc.

As to this, a number of facts are pertinent: (1) The pro rata cost of the remaining stock of IDS now held by Alleghany based on the price paid in 1949 is $1,312,784.36. The fact that this relatively modest investment has proven spectacularly successful has no great bearing on appraising [fol. 657] the essential nature of Alleghany's operations. It is more pertinent to inquire into the relative investments Alleghany has made in rail as compared with non-rail securities, and not how well or how badly these have fared. (2) Alleghany never intended to involve itself deeply or permanently in the investment field. However pleased Alleghany may be with the success of its IDS investment, it has for some time desired to reduce this investment. During December 1954, it sold 45,000 voting shares (11+%) of its IDS shares. Also during December 1954, it agreed to sell, on certain conditions, 55,000 additional voting shares of IDS, and to exchange 130,000 voting shares for a similar number of non-voting shares. This was objected to by the SEC. Alleghany now proposes, in order to divest itself of control of IDS, to exchange 212,000 voting for non-voting shares. (3) An impediment to Alleghany's disposition of IDS stock has been the necessity for SEC approval of any transaction. (4) The SEC has jurisdiction of IDS under the Investment Company Act and does not need to control Alleghany in order to supervise the affairs of IDS.

The SEC has raised every conceivable objection to Alleghany's efforts to dispose of stock in and control of IDS. Thus while urging Alleghany's ownership of stock in IDS as a basis for this Commission to abdicate its control over Alleghany, the SEC has thwarted or delayed Alleghany's sale of such stock. The SEC seems determined not to let Alleghany deprive it of its last remaining argument—however feeble—that it should replace this Commission in its regulation of Alleghany. The other non-rail stocks that the SEC originally counted on to make its case having been [fol. 658] substantially sold and New York Central stock holdings greatly increased, the SEC now grasps at the IDS

stock as a last straw and seems unwilling to let Alleghany sell it.

In this connection, in paragraph 4 the SEC also states that the business of Alleghany "has been for some years, that of an investment company * * *." Holding this view, it is strange indeed that the SEC waited until 1954 before moving to dissolve its order of October 4, 1945 granting Alleghany an exemption from the Investment Company Act. Its action came only after Alleghany had divested itself of control of C & O and the ICC had issued an order to show cause why in the light of that divestiture, Alleghany's status as a carrier should be continued. The SEC action in contradistinction to its words indicates a belief that Alleghany's status is dependent on control of a major railroad rather than upon its investments in non-rail securities.

7. The concluding paragraph of the SEC's present pleading embodies a suggestion on which we desire to make brief comment. The SEC here refers to the possibility that this Commission might declare Alleghany a carrier and undertake its regulation, but subject to the condition that Alleghany obtain the SEC's approval prior to engaging in such transactions as would fall under the Investment Company Act, were Alleghany registrated under that act. We would regard the fastening of this type of condition on Alleghany as disingenuous and a deliberate flouting of the Congressional intention, disclosed in Section 3(c)(9) of the Investment Company Act, that no holding company be subjected to the regulatory jurisdiction of more than one agency.

[fol. 659] The further vice of this suggestion is the implicit assumption that only the SEC, and not this Commission, is competent to regulate Alleghany and protect the public interest, an assumption which we have shown is contrary to the history of ICC regulation of Alleghany.*

The effort of the SEC in this, as in prior pleadings, is to rewrite Section 3(c)(9) of the Investment Company Act so as to delete the unqualified exemption of companies subject to regulation under the Interstate Commerce Act and

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* See Appendix I, p. 14.

to rewrite Section 5(3) of the latter act so as to grant this Commission the right to abdicate its plain duties and responsibilities to regulate a railroad management holding company controlling and managing a railroad the size of New York Central.

The SEC pleadings, as Division 4 observed, should be addressed to Congress with a request for amendment of these two sections rather than to this Commission.

Respectfully submitted, Alleghany Corporation, By Edward K. Wheeler, Its Attorney.

April 13, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 660] CERTIFICATE OF SERVICE

(omitted in printing)

[fol. 661] BEFORE THE INTERSTATE COMMERCE COMMISSION

APPLICATIONS OF ALLEGHANY CORPORATION

Finance Dockets Nos. 18866 and 14692

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER

Finance Docket No. 18656

REPLY OF ALLEGHANY CORPORATION TO THE APRIL 8 AMENDED PETITION OF BRESWICK & CO., THE GILBERTS AND PHILLIPS—Filed April 14, 1955.

Breswick & Company, Lewis D. and John Gilbert, and Randolph Phillips, continuing their attempted harrassment of Alleghany, served on April 11, 1955, the sixth pleading filed by one or more of the group, seeking to prevent or delay Commission approval of pending applications by Alleghany. This sixth pleading embodies all prior re-

quests for relief, as witness its broad styling as an "Amended Petition for Leave to Intervene in Finance Dockets Nos. 14692, 18656, and 18866; and Amended Petition for Reconsideration in Nos. 14692 and 18656."

The arguments of the amended petitions are exclusively predicated upon an opinion of Judge Walsh, denying a motion of Breswick & Company for a preliminary injunction, enjoining Alleghany from (a) prosecuting its pending application in No. 18866, (b) issuing new preferred stock, (c) consummating any agreement for sale or exchange of stock in Investors Diversified Services, Inc., (d) engaging in transactions violative of the Investment Company Act, and (e) prosecuting an application in Nos. 14692 and 18656 (and mandatorily requiring the withdrawal of such [fol. 662] application). Judge Walsh's opinion was rendered in *Breswick & Co. and Neisloss* v. *Alleghany Corporation, et al.*, Civil Action No. 98-371, United States District Court for the Southern District of New York.

An examination of Judge Walsh's opinion (appended to petitioners' pleading) shows that it does not rule, as petitioners state, that "petitioners have a right as a matter of law to intervene in these proceedings 'to challenge the jurisdiction of the I.C.C.'" Judge Walsh refused plaintiff Breswick & Company the aid of the Court through application of the familiar doctrines of the *Myers* and *Macauley* cases* which, in short, forbid collateral or premature attempts to review in court questions reserved for decision by an administrative body. Judge Walsh noted that the questions which plaintiff sought to have him decide, such as that respecting Alleghany's status, were questions which had to be determined by this Commission and could be brought before a court only through review of this Commission's decision.

Judge Walsh's refusal to grant a preliminary injunction for the foregoing reasons cannot be tortured into a determination that plaintiff Breswick & Company (or the other petitioners) had any right to intervene in this Commis-

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* *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946).

sion's proceedings. The judge told the plaintiff, in effect, that its wares were offered at the wrong counter but he did not promise the plaintiff that his wares would be bought if offered at the counter which dealt in such goods. Whether plaintiff-petitioner had standing to intervene, [fol. 663] whether it had adequately disclosed a sufficient interest, whether its intervention would be helpful or merely clog the administrative process, whether it had timely requested intervention—these were questions which were not and could not be before Judge Walsh and, in fairness to him, he did not presume to pass upon them.

It is equally clear that Alleghany's opposition to the present petitions is not "inconsistent" with any "representations of Alleghany to the District Court." What Alleghany argued was precisely what the District Court held. In its contention that plaintiff-petitioner Breswick & Company could not invoke the Court's jurisdiction, Alleghany pointed out that the only proper remedy was before this Commission but went on to stress *"if they have any standing in any tribunal, which we deny."* (Alleghany's Memorandum in Opposition to Motion for a Preliminary Injunction, p. 52)

Petitioners also try to read too much into the statement that "The interests of minority stockholders in proceedings under Section 5 and Section 20a of the Interstate Commerce Act must be considered and protected by the Commission." The truth of this statement is beyond question, but it does not mean that, in the discharge of its duty to protect minority interests, the Commission must permit intervention by any would-be intervener, entirely apart from his interest, motivation, or ability to aid the Commission. Judge Walsh cited two cases in support of his statement as to the Commission's duty to protect minority interests. These cases clearly support Judge Walsh's statement but the only relevance to the distinctive question [fol. 664] of intervention is the statement that "the law does not require that minority stockholders be made parties to a proceeding before the Commission . . ."*

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* The quotation is from *Cleveland, C.C. & St. L. Ry. Co.* v. *Jackson*, 22 F. 2d 509, 511 (6th Cir., 1927) which refused

Judge Walsh's opinion, thus, affords no comfort to these petitioners but leaves them, vis-a-vis this Commission, precisely where they stood before. For reasons adequately set forth by Division 4 in denying prior petitions for leave to intervene, and also set forth by Alleghany in its responses to five prior pleadings, the present amended petitions for leave to intervene should be denied. It should be noted, however, that Division 4's initial denial of a petition for leave to intervene (that of the Gilberts by Order of February 15, 1955) pointed out clearly and sharply that the petitioners had failed to make adequate disclosure of their interests and how they might differ from stockholders generally. This is the fourth subsequent petition by one or more of the group, but they still fail to make any such disclosure. They do not provide even such rudimentary details as the number of shares beneficially owned and, what may be crucial, the date when they acquired them.

In the welter of pleadings filed by the petitioners, parties and issues have become jumbled, and questions as to the timeliness of the present pleading and its repetitive nature become obscured. For example, this is the first tri-party [fol. 665] pleading, but all three petitioners have joined in prior pleadings with one or both of the others, and all but Phillips filed one or more individual pleadings. This is the fourth petition by Breswick & Company for leave to intervene in Dockets Nos. 14692 and 18656, but its first petition for leave to intervene in No. 18866.

Laying aside its repetitive nature (as to most parties on most issues), the fact is that the present pleading is not timely as to any issue from the viewpoint of any party.

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an injunction to minority stockholders against an ICC order approving a lease under the consolidation provisions of the Transportation Act of 1920. The other cited case is *Schwabacher* v. *United States*, 334 U.S. 182 (1948), which held that the Commission, in approving a railroad consolidation, was under no obligation to apply state law relative to the rights of dissenting stockholders on the "winding up" of a corporation.

As to No. 18866, Rule 56.3(d) allows 15 days within which to apply for intervention and, since Alleghany's application was filed February 18, 1955, the deadline date for intervention applications passed on March 5, 1955 (more than a month ago). As to Nos. 14692 and 18656, Division 4 granted the applications therein by Order served March 3, 1955 and, under Rule 101(e) petitions for reconsideration of that Order (or such subsidiary orders as those denying intervention) had an April 2, 1955 deadline.

To excuse their tardiness, petitioners now assert that the pendency of a motion for a preliminary injunction* constituted "good cause" for not filing petitions to intervene in No. 18866 until more than 15 days after the application therein. The argument is fallacious; the existence of the litigation in the federal District Court in New York constituted no justification whatever for petitioners' delay in endeavoring to intervene in the Commission proceedings. Petitioners are simply saying that they hoped to win a litigation which would have fully served their pur- [fol. 666] poses, and made it unnecessary for them to seek intervention in the Commission proceedings. Even if petitioners miscalculated the chance of success in the New York litigation, they cannot offer their own miscalculation to excuse their tardy appearance before the Commission. The possibility of their losing the litigation was always present, and was a risk they deliberately assumed. Moreover, if petitioners are right, it would stretch indefinitely the time within which they may seek intervention before the Commission; the federal court's decision was responsive to a motion for a preliminary injunction and final decision on the merits may be months away. The logic of petitioners' argument would excuse their attempted inter-

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*Judge Ryan, on March 4, 1955, granted a temporary restraining order until plaintiffs' motion for a preliminary injunction could be heard.

vention before the Commission until final disposition of the litigation.*

Respectfully submitted, Alleghany Corporation, By (S.) Edward K. Wheeler, Its Attorney.

April 14, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

[fol. 666a] CERTIFICATE OF SERVICE (Omitted in printing)

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* While there is no doubt that petitioners act as a group, in this instance it involves them in inconsistencies. Since only Breswick & Company was a plaintiff in the federal court action, only it, if anyone, could be excused for late filing at the Commission. Yet petitioners present the argument in behalf of all three. But the Gilberts and Phillips did not wait for a decision in the litigation to seek intervention in No. 18866; they sought intervention some two weeks before Judge Walsh rendered his opinion. They thus belied by their action any argument that the litigation justified delay in their seeking Commission intervention.

[fol. 667] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18656[1]

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Submitted April 14, 1955

Decided May 24, 1955

REPORT

Upon consideration of petitions herein granted in part, previous order by division 4, approving and authorizing the merger of the properties of the Louisville & Jeffersonville Bridge and Railroad Company, and necessary corporate rearrangements related thereto; holding that Alleghany Corporation is a carrier subject to the provisions of portions of certain sections of the Interstate Commerce Act; and terminating effective portions of the order of June 5, 1945, in Finance Docket No. 14692, affirmed. Previous report — I.C.C. —, decided March 2, 1955.

Request for hearing denied.

Appearances as shown in prior report; also, *Thomas G. Meeker*, and *Myron S. Isaacs* for Securities and Exchange Commission, *Joseph B. Hyman, George Brussel, Jr.*, for interveners, and *Randolph Phillips, pro se*, intervener.

Report of the Commission on Reconsideration

By the Commission:

In this proceeding, by report and order of March 2, 1955, — I.C.C. —, division 4 approved and authorized merger of the properties and franchises of the Louisville & Jefferson-

[1] Also embraces Finance Docket No. 14692, *Chesapeake & Ohio Railway Company Purchase, etc.* Previous reports 261 I.C.C. 239, and 271 I.C.C. 5.

ville Bridge and Railroad Company (Jeffersonville) into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four) for ownership, management, and operation, and through that company, continued control of the said properties and franchises by The New York Central Railroad Company (Central) and the Alleghany Corporation (Alleghany); modified the lease of January 2, 1930, between Big Four and Central respecting operation of the properties of Big Four; continued Alleghany under the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce [fol. 668] Act (the act); terminated the effective portions of the order of June 5, 1945, in Finance Docket No. 14692; and retained jurisdiction to make such further order or orders as may be necessary or appropriate.

The Securities and Exchange Commission (S.E.C.) on April 1, 1955, filed a petition for reconsideration and reversal of the division insofar as it holds Alleghany to continue to be a carrier subject to provisions of the act under section 5(3). The petition reiterates the contentions submitted in S.E.C.'s memorandum filed September 14, and December 14, 1954, (discussed at length under appropriate headings in the division's report). Alleghany and Central filed replies to the petition.

A petition for rehearing and reconsideration was filed March 21, 1955, on behalf of Lewis D. Gilbert and John Gilbert, and Breswick & Company, seeking reconsideration of orders by division 4, dated February 9 and 15, and March 2, 1955, denying and dismissing their previously filed petitions for leave to intervene in the proceedings herein. In a joint petition with the said Gilberts filed March 28, 1955, one Randolph Phillips on his own behalf, requested leave to intervene in these proceedings and in Finance Docket No. 18866, *Alleghany Corporation Stock*, pending determination by the division, and to join in the petition for rehearing and reconsideration filed by the Gilberts; and on April 11, 1955, an amended petition for leave to intervene in the three proceedings was filed jointly by the Gilberts, Breswick, and Phillips. The amendatory petition is premised upon an opinion dated April 6, 1955, rendered in *Breswick & Co.* v. *Alleghany Corporation*,

(Civil Action 98-371) by the United States District Court, S. D. N. Y., which collaterally held that the interests of [fol. 669] minority stockholders in proceedings under sections 5 and 20a of the act must be considered and protected by us. They request reconsideration and reversal of the report and order of March 2 and denial or dismissal of the application therein considered. They also request denial of application of Alleghany in Finance Docket No. 18866 for authority to issue stock. In the alternative they request that all of the proceedings be set for hearing. Alleghany filed replies to the petition on March 28, 1955, and to the amended petition on April 14, 1955.

For the purpose of giving consideration to their contentions with respect to the proceedings here under consideration, the Gilberts, Breswick & Co., and Phillips are permitted to intervene therein, and to be treated as parties to the record as of the date of this report.

For the reason that the interveners are concerned primarily with the interpretation of paragraphs (2) and (3) of section 5 of the act, and their application to the facts disclosed in these proceedings, it is our opinion that there is no need to order a hearing. The petitions for reconsideration are granted and will be considered on the present record in view of the contentions of the interveners and of Central and Alleghany. We are in general accord with the ultimate conclusion of the division and believe it is supported by the facts. In discussing our views herein, only the more important facts pertaining to the issues raised in the petitions will be stated. Contentions not specifically discussed, and not treated in the division's report, have been given consideration and found to be without material significance or not justified.

[fol. 670] The position of the S. E. C. goes primarily to the division having erred in finding that because Alleghany controls a sizeable rail carrier it is a "railroad holding company" subject to the act, rather than an "investment company" whose regulation properly lies within the jurisdiction of the S. E. C. under the Investment Company Act of 1940. The S. E. C. argues that section 5(3) of the act provides us latitude to exercise discretion as to who should or should not be subject to the accounting, reporting, and

securities regulations contained in the act. It submits that by collaborating with us, it could prescribe regulations which would satisfy the intent of the requirements of our act, and at the same time, protect the interests of the investing public by having Alleghany's activities regulated in the same manner as other investment companies. In reply, the applicants contend that the legislative history concerning the possible conflict of jurisdiction between the statutes administered by this Commission and by the S. E. C. shows that, as the expert agency in transportation matters, we are entrusted with the regulation of holding companies which manage and control the affairs of major rail carriers, and that section 3(c)(9) of the Investment Company Act is without ambiguity in stating:

[fol. 671] (c) Notwithstanding subsections (a) and (b) none of the following persons is an investment company within the meaning of this title:

* * * * *

(9) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided,* That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act.

Concerning our discretionary power as to whether a holding company should be considered as a carrier subject to the act, Alleghany submits that the discretion under section 5(3), namely, ". . . shall to the extent provided by the Commission in such order . . .", goes to whether the company in question shall be subject to some, but not all, the prescribed provisions of the act, and that any exercise of discretion, by all standards, must be reasonable. It contends that the S. E. C. and its regulatory powers would not be prejudiced by continuation of Alleghany's status as a carrier subject to the act, (which has existed since 1945) in view of its recent acquisition of Central and its related carriers. Alleghany and Central both submit that any dual

jurisdiction over Alleghany would adversely affect the operation of the railroad, and would be confusing and burdensome to its management.

We are not in accord with the suggestions of the S.E.C. As the division stated, we believe that unless Congress amends either or both of the statutes involved herein, the results which S.E.C. desires to achieve are not within our powers under the Interstate Commerce Act. The extent to which we may exercise any discretionary powers in this area has been determined by division 4 in policies developed since 1941, recited in *Wabash R. Co. Control,* 247 [fol. 672] I.C.C. 365, *Delaware & H. R. Corp. Debt Adjustment,* 254 I.C.C. 339, and *Atlantic Coast Line R. Co. Purchase,* 261 I.C.C. 820 (not printed in full) decided December 12, 1945. In its criticism of the division's action, the S. E. C. has not undertaken to show upon what facts the situation now under consideration differs from the pertinent situation underlying each of the foregoing decisions. As shown by the division, the S. E. C. contentions rely largely in revealing facts which seem to contravene the proviso of section 3(c)(9) of the Investment Company Act relating to the controlled company's assets consisting substantially of securities of companies subject to the Interstate Commerce Act. In our opinion that section, read in context, provides a test for the S.E.C. to apply in determining whether such companies are or are not to be exempted from regulation under the Investment Company Act. The amount or kind of carrier investment is not controlling in our consideration of whether the company in control shall be considered within the jurisdiction of the Interstate Commerce Act. We concur in the findings that we should consider Alleghany as a carrier subject to the provisions of the act specified in section 5(3).

The common interest of Lewis D. and John Gilbert, Breswick & Company, and Randolph Phillips is that each are record or beneficial minority stockowners in Alleghany and Central, or both. Their representations with respect to the application of Alleghany to issue stock, Finance Docket No. 18866 will be considered separately in that proceeding. Primarily, their position is that under the act we are without power to consider Alleghany as a party

applicant, because its acquisition of control of Central and its related carriers is unlawful for the reason that it [fol. 673] was accomplished without our authorization under sections 5(2) and 5(4) of the act; that Alleghany does not in fact exercise control over Central's board of directors, even though the individuals had been nominated by Alleghany or its associates, and were elected by the stockholders after a prolonged proxy contest waged by Alleghany and the then management of Central; that Alleghany's status as a carrier subject to the act, authorized in Finance Docket No. 14692, June 5, 1945, expired automatically in January 1954, when it disposed of its last stock holdings and vestige of control of the Chesapeake & Ohio Railway Company, at which time Alleghany reverted to its original status of an investment company subject to the jurisdiction of the S. E. C.; and that Alleghany's desire to be subject to regulation by this Commission is solely a device to avoid regulation by the S. E. C. under the Investment Company Act. Alleghany's replies submit that the division correctly disposed of all the issues; that Alleghany's status as a carrier has remained unchanged since first decreed in 1945; and that the interveners' repeated petitions were filed in these proceedings merely to harrass Alleghany in its operation of Central.

Central was formed in 1914 by the consolidation of 11 carrier companies. It is the parent company of the New York Central Railroad system, comprised of numerous carriers including several railroad systems and the railroads and properties controlled and operated by those companies under lease or otherwise. The present system was recognized by us as an integrated unit in *New York Central Unification*, 150 I.C.C. 278, decided January 14, 1929, and upon the internal rearrangement of Central's corporate structure pursuant to our decision in Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 [fol. 674] I. C. C. 813 (not printed in full), decided June 18, 1952. As outlined in detail in the foregoing reports and in the record herein, the same executives serve Central and the subsidiary companies and the carriers of the system have interlocking directorates. When Alleghany, by stock ownership and by the favorable action of the stock-

holders acquired control of Central, all the properties within the carrier's orbit were under long established single operating control. The proposed merger of the Jeffersonville into the Big Four, both being units of the same carrier system, will simplify the internal corporate structure of Central. Alleghany states that from time to time other internal rearrangements will be initiated through mergers, consolidations, leases, and other acquisitions of property.

The consolidation and integration of separate railroad properties, most of them having originated as small or short lines, has been largely responsible for the development of the present great network of rail transportation in this country. It has enabled transportation service to respond to the expanding needs of commerce. Experiences in the early history of the country, dating back to Colonial times, indicated the absolute necessity of removing all unnecessary impediments to the movement of traffic, so that it could always be continuous from origin to destination. This has been a matter of concern to Congress and it has legislated on the subject many times. (See, for instance, Act of 1866, U.S.C. Sec. 84, and Sec. 7 of the Interstate Commerce Act.)

One of the outstanding characteristics of this process of consolidation and integration has been the formation of so-called family lines or systems of railroads—that is, separate railroad properties functioning as unified systems under common control and management.

[fol. 675] To give Section 5 an interpretation which would require our approval each time stockholders decide to change directors of established system properties, or to elect new officers, and, consequently, to install new management would have a tendency to set in motion within the organizations contending forces which might well impair or destroy the results of legitimate integration. Although Congress has subjected the merging of railroad properties in many respects to regulation in order to prevent abuses and to protect the public interest, we do not believe it intended for Section 5 to be construed in a way that might produce undesirable results. Our interpretation of this section is to the contrary.

Under the pertinent portions of section 5(2) of the act it is lawful, with our approval, for any carrier or two or more carriers jointly to acquire control of another carrier, or for a person which is not a carrier to acquire control of two or more carriers, or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier, through ownership of stock or otherwise. Whether Alleghany was a "carrier" or "a person which is not a carrier," and whether it had "control of one or more carriers" at the time of the filing of the application herein (September 20, 1954) are questions to be determined by us. In resolving these problems it is necessary to determine Alleghany's relationship with carriers of the Chesapeake system. The record shows that on or about January 19, 1954, Alleghany divested itself of its remaining stocks of the Chesapeake system, and no longer controlled or had the power to control any carrier subject to the act.

The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central.

The order of June 5, 1945 held that Alleghany should be [fol. 676] considered as a carrier only for limited stated purposes. This holding in no way affects the determination of Alleghany's status under the provisions of paragraph (2) of section 5, which would govern the determination of our jurisdiction over its acquisition of control of the Central. In view of the above stated divestiture by Alleghany of the stocks of carriers subject to the act, we conclude that at the time of its acquisition of control of the Central on May 26, 1954, it was in fact a "person not a carrier" as that phrase is used in section 5(2) of the act. As Central, at the time of such acquisition of control was

recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the act and that our approval was not necessary.

The subsequent filing by Alleghany of its application in these proceedings for approval of a rearrangement of the corporate structure of Central and its subsidiaries was pursuant to and consistent with the decision of the United States Supreme Court in *United States v. Marshall Transport Co.*, 322 U.S. 31, which held that the controlling person was a necessary party in proceedings for approval of acquisition of the properties of a motor carrier subject to the act by a motor carrier controlled by a person not a carrier. The same was true with respect to the application of the New York Central for authority to acquire direct control, and by Alleghany to acquire indirect control of Boston and Albany Railroad Company, which application was granted by the division by report of March 22, 1955, in Finance Docket No. 18789.

Our jurisdiction under section 5(2) of the act over any rearrangement by Central of its ownership or control of its subsidiaries is well established. We do not deem it inconsistent with our lack of jurisdiction over acquisition of [fol. 677] control over the established system, that Alleghany be considered a necessary party in proceedings for rearrangement of control. The first is a transaction in which it appears from the provisions of the act that no public interest is involved. But failure to recognize that the public interest requires our approval of changes in the relationship of the carriers constituting the system would ignore the clear intent of the act as interpreted by our own and by court decisions.

We conclude and find that we have jurisdiction to consider the application for approval of the merger of the Jeffersonville into the Big Four, modification of the lease by Central and the continued control of the Jeffersonville in modified form by Central and Alleghany. The details of the transactions and descriptions of the properties of the various companies were shown in the report of Division 4. We affirm the findings of Division 4 that these transactions and the continued control by Central and Alle-

ghany are within the scope of section 5(2) of the act, as amended, that the terms and conditions are just and reasonable and that the transactions and continued control will be consistent with the public interest.

As appears from the foregoing discussion, Alleghany at the time it filed its application was in fact a person not a carrier which controlled an established system, and which was seeking authorization under section 5(2) for modified control of one of the system subsidiaries. Section 5(3) provides in part as follows: "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as [fol. 678] are applicable to any carrier involved in such acquisition of control. . . .". We believe it is clear that under these provisions we are required in connection with our approval of such an application to find that Alleghany is a carrier, and to determine the extent to which it should be subject to the provisions of the act specified in the quoted section, viz, section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive. It is our opinion that division 4 properly applied the quoted provisions of the act. We affirm that ruling.

An appropriate order will be entered.

COMMISSIONER CROSS concurs in the result.

COMMISSIONER ELLIOTT and COMMISSIONER HUTCHINSON did not participate in the disposition of these proceedings.

COMMISSIONER FREAS was necessarily absent and did not participate in the disposition of the proceedings.

[fol. 679] BEFORE THE

INTERSTATE COMMERCE COMMISSION, GENERAL SESSION

Finance Docket No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Finance Docket No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

ORDER—May 24, 1955

It appearing, That the Commission, by division 4, by its report and order of March 2, 1955, in the above-entitled proceedings approved and authorized the merger of the properties of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for ownership, management, and operation, and through that company, continued control of the said properties and franchises by The New York Central Railroad Company and the Alleghany Corporation, and the modification of a lease of January 2, 1930, between the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The New York Central Railroad Company respecting operation of the properties of the former; subjected the Alleghany Corporation to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act; terminated the effective portions of the order of June 5, 1945, in Finance Docket No. 14692; and retained jurisdiction to make such further order or orders as may be necessary or appropriate.

It further appearing, That on April 1, 1955, the United States Securities and Exchange Commission filed a petition for reconsideration and reversal of the division insofar as it holds the Alleghany Corporation to continue to be a carrier subject to provisions of the act under section 5(3); that on March 21, 1955, a joint petition for rehearing and reconsideration was filed by Lewis D. Gilbert and John

Gilbert and Breswick & Company, against orders of division 4, dated February 9 and 15, and March 2, 1955, denying and dismissing previously filed petitions for leave to intervene in these proceedings; that on March 28, 1955, Randolph Phillips, *pro se,* filed a petition for leave to intervene [fol. 680] and to join in the petition of the Gilberts; and that on April 11, 1955, a joint amended petition for leave to intervene and for reconsideration was filed by the Gilberts, Breswick & Company, and Phillips.

It further appearing, That the New York Central Railroad Company and the Alleghany Corporation filed replies to the petition of the Securities and Exchange Commission; and Alleghany Corporation filed replies to each petition filed by the Gilberts, Breswick & Company, and Phillips.

It is ordered, That the petition of the Securities and Exchange Commission to the extent it requests reconsideration be, and it is hereby, granted.

It is ordered, That said Lewis D. Gilbert, John Gilbert, Breswick & Co., and Randolph Phillips be, and they are hereby, permitted to intervene in the above-entitled proceedings and be treated as parties thereto as of the date hereof, and their petitions, so far as they request reconsideration be, and they are hereby granted, and their request for hearing be, and it is hereby, denied;

And it further appearing, Upon consideration of the record herein and the contentions set forth in said petitions and replies, that this Commission, on the date hereof, made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, That the order dated March 2, 1955, described in the first paragraph hereof, be and it is hereby, affirmed;

And it is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 681]

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18866

Alleghany Corporation Stock

Submitted April 14, 1955 Decided May 26, 1955

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

Burton K. Wheeler and *Edward K. Wheeler* for applicant.

George Brussel, Jr. and *Joseph B. Hyman* for interveners in opposition to the application.

Randolph Phillips, pro se, intervener in opposition.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS JOHNSON, MITCHELL, AND TUGGLE

BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not

exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a [fol. 682] hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable us to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own, hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I.C.C. —, we approved and authorized, among other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par [fol. 683] value $10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes, approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for shares of its [fol. 684] series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given

an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p.m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p.m. on the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent preferred stock in temporary form in accordance with the instructions set forth in the letter of transmittal accompanying the certificates surrendered. The [fol. 685] applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p.m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certifi-

cates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The application represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However, none of them has entered into any agreement [fol. 686] with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends, following the issuance of the 6-percent preferred stock, thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either

1953 or 1954. Because of the uncertainty as to the number of shares of series A preferred stock which may be surrendered, the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of [fol. 687] August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note*, 282 I.C.C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes*, 282 I.C.C. 817. The applicant has agreed, in connection with these two loans, as well as in the indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities*, 282 I.C.C. 818, were issued, among other things, not to pay, without the consent of such banks and the holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set forth in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par

[fol. 688] value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ percent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6 percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955, will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to [fol. 689] the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set

forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-percent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock; or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors. There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of com- [fol. 690] mon stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment for dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A preferred stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Exchange on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the

arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place [fol. 691] on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A pre-

ferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

[fol. 692] J. P. Morgan & Co. Incorporated, and Colonial Trust Company, both of New York City, have been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant, upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective

holdings, any shares of common stock issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one [fol. 693] of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Allegheny Corporation Securities, supra* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting right or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of bene- [fol. 694] fiting the remaining holders of such preference stocks, and eventually restoring an asset equity for the common stock. As a result of this program, the applicant

has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470, and $103,380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to [fol. 695] meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrearages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock

redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the effect of diluting the rights of the common stockholders, as such rights than exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

[fol. 696] The short term effect of the exchange of series A preferred stock for 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

Assets

Total investments		$43,264,637
Current assets		8,256,621
Deferred assets		7,075
Unadjusted debits		1,362,699
Total assets		$52,891,032

Liabilities

Capital stock		
$4 prior preferred convertible	$ 2,067,600	
Preferred	13,674,400	
Common	4,637,797	
Premiums on common stock	142,297	
Total stock		$20,522,094
Long-term funded debt unmatured		
Book liability	21,200,000	
Reacquired and held in treasury	504,000	
Total long-term debt		20,696,000
Current liabilities		2,427,928
Deferred liabilities		2,050
Surplus—unearned	106,976,335	
earned-appropriated	718	
earned-unappropriated (deficit)	97,734,093	
Total surplus		9,242,960
Total liabilities		$52,891,032

[fol. 697] Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that

date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each [fol. 698] share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the maximum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for

its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accurately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes with exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities*, 257 I.C.C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

[fol. 699] Interveners allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Interveners state that issue of stock as proposed will dilute the equity of the common stock and, as a result thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the

series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Interveners state that the common stockholders have not been protected by "arms-length bargaining" between persons owning or representing only common stock and owners or representatives of the other classes of securities affected [fol. 700] by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (515,500 shares) was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his investment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the

findings required by the statute as a condition to approval of the issue of securities properly may be made.

[fol. 701] It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation of not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid, is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful [fol. 702] objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

[fol. 703] BEFORE THE INTERSTATE COMMERCE COMMISSION

Division 4

Finance Docket No. 18866

Alleghany Corporation Stock

ORDER—May 26, 1955

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9,

1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C.F.R. 56);

It is further ordered, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

It is further ordered, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

Harold D. McCoy, Secretary.

(Seal.)

[fol. 704] BEFORE THE INTERSTATE COMMERCE COMMISSION

Alleghany Corporation Stock

Finance Docket No. 18866

PETITION OF BRESWICK & CO., ET AL. FOR RECONSIDERATION—Filed June 2, 1955

Come now Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, record or beneficial owners of common stock of the Alleghany Corporation, and hereby petition the full Commission for reconsideration of the Report and Order dated May 26, 1955, by Division 4 in the above entitled matter; and also comes now The Protective Committee for Common Stockholders of the Alleghany Corporation by Randolph Phillips, Chairman, and Myron Neisloss and Edward C. Sterling (Messrs. Neisloss and Sterling also being common stockholders of Alleghany Corporation) and prays that this Commission grant leave to intervene herein and, upon such intervention that it reconsider said report and order. The interest of said Committee in this and related matters is set forth in Exhibit A to this petition.

In support of this petition, petitioners respectfully allege:

[fol. 705] I

The Jurisdiction of the Commission Was Improperly Obtained by Alleghany

1. The Commission's order and report dated May 24, 1955 in Finance Docket No. 18656 finding and asserting jurisdiction over Alleghany Corporation, on the basis of which Division 4 found that the Commission has jurisdiction over the application herein, are without authority in law. Contrary to the findings and order in 18656, Alleghany is not lawfully a carrier in fact or in law within the meaning of Section 5(3) of The Interstate Commerce Act. The application of Alleghany in 18656 was not subject to the jurisdiction of the Commission. Petitioners have previously raised these questions in their pleadings in 18656, but the Commission did not see fit to pass upon the issues, as joined by petitioners, on a full record made after opportunity for an evidentiary hearing and oral argument.

2. This Commission did not acquire and does not have lawful jurisdiction over Alleghany Corporation. The report and order dated May 24, 1955, in Finance Docket No. 18656, on the basis of which Division 4 found that the Commission had jurisdiction over this application, was based upon an application by Alleghany Corporation dated September 17, 1954, in which the representation was made under oath by Thomas J. Deegan, Jr., Alleghany's Vice President in Charge of Public Relations, that Alleghany "recently acquired control of the Central as the result of [fol. 706] a proxy contest in which the slate of directors nominated by Alleghany was elected as the Central's Board of Directors" (p. 17). This Commission in deciding this issue in No. 18656 did so on the basis of Alleghany's application unsupported by probative, reliable and substantial evidence, subject to cross-examination as required by due process of law, and the Administrative Procedure Act.

Petitioners allege and offer to prove by competent evidence, if a hearing is set for that purpose as petitioners

hereby request, that Alleghany neither "acquired control of Central" in the 1954 proxy contest nor nominated said directors, and that said directors were nominated by Robert R. Young and Allan P. Kirby who, with their associated nominees (sic) secured control in their *individual* and not in their corporate capacities.

3. The report and order dated May 24, 1955 in No. 18656, insofar as it relates to Alleghany Corporation, is null and void. We allege and offer to prove, if any denial be made, that Young and Kirby control said Corporation and did not join in its application therein, although they were necessary parties under the doctrine of *United States* v. *Marshall Transport Co.*, 322 U.S. 31. Thus even assuming without admitting that Alleghany controls Central, this Commission has no jurisdiction over Alleghany and was without power to approve said application.

[fol. 707]

II

The Exchange Plan Has Expired by Limitation, and the Application Herein Is Moot.

1. The application in No. 18866 is moot, the plan therein having expired by the self-imposed limitation that the exchange offer dated February 10, 1955 was "subject to the approval of this Commission on or before May 31, 1955." (Report, sheet 4). This must mean approval by a final order of the Commission, not an interlocutory order as is the order of Division 4 in view of this petition for reconsideration and the provisions of Section 17(8) of the Interstate Commerce Act. The effective date of the Division 4 order, moreover, is not until 10 days after May 26, 1955. (Order, next to last paragraph). Thus the approval of Division 4 is not effective until after May 31, 1955, contrary to the plain requirement of the plan that the order of approval be effective "on or before May 31, 1955."

[fol. 708]

III

Division 4 Denied to Petitioners Due Process of Law in Its Disposition of Alleghany's Application

1. By order dated April 20, 1955 per J. Monroe Johnson, Commissioner, petitioners were permitted to inter-

vene herein and be treated as parties hereto. *Said order was withheld from petitioners and not served upon them until May 27, 1955, one day after Division 4 rendered its decision herein.*

2. Division 4 erred in reporting that petitioners "described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment." (Sheets 1 and 2). Petitioners' pleadings dated March 23, 1955, properly alleged ultimate facts and legal claims in 8 separately numbered paragraphs. Under modern rules of pleading it is improper to introduce evidence in a pleading. Neither the Administrative Proceedure Act nor the Commission's general rules of practice require that evidence shall be particularized or even pleaded and it is not customary so to do. Had intervenors been requested to particularize their evidence or to make a proffer of proof they would have complied with such request. However, instead of requesting such particularization or proffer, Division 4 suppressed the order granting intervention with the result that intervenors did not learn that they had been admitted to the proceeding until after it had been decided and their request for a hearing denied. The "justification" for a hearing was [fol. 709] sufficiently set forth in 8 separately numbered paragraphs.

3. Young, Kirby and Alleghany appear to enjoy a special status before Division 4, which apparently requires neither to prove any case in which they have an interest by reliable, probative and substantial evidence, subject to cross-examination. In various court proceedings and otherwise much sworn and documentary evidence has been accumulated and the testimony of Young taken on matters at issue in this docket and in No. 18656. Division 4 has no knowledge of these matters and apparently takes no steps to inform itself thereof. It is thus the least informed expert on the matters with which it is most concerned. A plenary hearing before the full commission is required in the interests of substantial justice.

4. In view of the sworn pleadings of intervenors controverting the ultimate allegations of fact and law contained in the application, it was error for Division 4 to

have acted on the mere application of Alleghany unsworn to by any officer having or claiming knowledge of the material facts.

5. Since Division 4 admits that the exercise of conversion rights "will at that time have the effect of diluting the rights of the common stockholders, as such rights then exist" (Sheet 15), inquiry should have been made as to whether a plan avoiding such dilution or with a lesser degree of dilution was not fair and feasible.

[fol. 710]

IV

The May 31st market quotation of $292 per share of the series A preferred is prima facie evidence of the impropriety of the plan, since the stock's maximum legal claim was $237, as of May 1, 1955.

The most the Series A preferred stockholders are entitled to receive in any plan under 20a is the "equitable equivalent" of their claim. *Group of Institutional Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U.S. 523, 565; *Otis & Co.* v. *S.E.C.*, 323 U.S. 624 at 639-640, and cases cited therein.

The fair and equitable rule is similar to the "just and reasonable" rule of Section 20a, and this equitable rule enunciated "in a federal statute of very similar purposes" applies to Section 20a proceedings. *Schwabacher* v. *U.S.*, 334 U.S. 182 at 198-199. "Current worth • • • governs." *Id.*, at 199.

"Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders." *Otis* case at p. 637.

It has never been held that a security with a marketable value, at the time of an administrative agency or court decision, of 123% of a maximum legal claim is the "equitable equivalent" of that claim. To so rule would be to hold 123% equal to 100%.

The windfall here attempted for the personal benefit of Mr. and Mrs. Robert R. Young and other Series A preferred stockholders is clearly improper and a fraud upon

the common stockholders. This attempted "windfall", it should be noted, as of May 31, 1955, amounts to more than 7 million dollars.

[fol. 711] Point V

Division 4 erred as a matter of law in holding that the stockholders vote was "a sufficient answer" to the absence of arms-length negotiation.

Concededly Young dominates Alleghany. As a controlling person, and as a fiduciary of Alleghany he could not, as a matter of law, set Alleghany upon a course which would result in a personal profit. Such overreaching conduct is a fraud upon Alleghany not susceptible of ratification by less than all of Alleghany's common stockholders. *Pollitz* v. *Wabash R.R. Co.*, 207 N.Y. 113; *Quintal* v. *Kellner*, 364 N.Y. 32; *Ward* v. *The City Trust Co.*, 192 N.Y. 61; *Continental Securities Co.* v. *Belmont*, 206 N.Y. 7.

Division 4 attempts to excuse the absence of arms-length bargaining between holders of the common stock exclusively and holders of the preferred stock exclusively on the ground that 70% of the common stockholders (without being informed of the issues) voted to approve the plan. Such a vote is irrelevant to the charge and is not "a sufficient answer" as held by Division 4 (Sheet 20).

This finding of Division 4 violates the rule of the *Schwabacher* case, 334 U.S. at 201 that "The Commission is under a duty to see that minority interests are protected." The vote does not protect the non-voting minority owning 30% of the common stock. In any event the vote is irrelevant to the issues. *Case* v. *Los Angeles Lumber Co.*, 308 U.S. 106, at 114-115.

Nor is the extent of Mr. Kirby's Alleghany stock holdings relevant. He had a perfect right to acquiesce in Young's manipulation if he chose so to do, but his acquiescence obviously does not bind non-acquiescing common stockholders.

The "sufficient answer" of Division 4 to intervenors complaint (sheet 20) is no answer at all.

[fol. 712]

VI

Since all of the material allegations of the application are controverted by intervenors' pleadings, there is no evidence, substantial or otherwise, to support the order herein.

Division 4's findings thus violate the most elementary requirements for affirmation of an administrative agency order.

VII

If the full commission approves the application, the effective date of its order should be stayed a reasonable time in order to permit application for a stay to the statutory court.

Conclusion

The applicaiton should be dismissed, or set down for hearing on the merits.

Respectfully submitted by (S.) George Brussell, Jr., By EGK, Attorney for petitioner Breswick & Co., and The Protective Committee for Common Stockholders of the Alleghany Corporation; Joseph B. Hyman, Attorney for petitioners Gilbert, 211 South Pitt Street, Alexandria, Va.; Randolph Phillips,* Pro Se, 53 East 74th Street, New York 21, N. Y.

June 1, 1955

[fol. 713]

AFFIDAVIT

STATE OF NEW YORK
County of New York, ss.:

RANDOLPH PHILLIPS, being duly affirmed, hereby deposes and says that he has read the foregoing amended petition for leave to intervene and the application for reconsideration and that all the statements in said petition and appli-

* See attached affidavit.

cation are true to the best of his knowledge, information or belief.

(S.) Randolph Phillips.

Affirmed to before me this 1st day of June, 1955.
(S.) Eugene G. King, Notary Public, State of New York, No. 03-7267750. Qualified in Bronx County. Certificate filed in New York County. Commission Expires March 30, 1956

[fol. 714] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 715] BEFORE THE INTERSTATE COMMERCE COMMISSION

Finance Docket No. 18866

Alleghany Corporation Stock

REPLY OF ALLEGHENY CORPORATION TO THE PETITION FOR RECONSIDERATION OF RANDOLPH PHILLIPS, ET AL.—Filed June 10, 1955

Comes now Alleghany, applicant in the subject proceeding, and respectfully replies to the petition of Randolph Phillips and others, seeking reconsideration of the Report and Order of Division 4, dated May 26, 1955, which granted, with modifications, Alleghany's application under Section 20a of the Interstate Commerce Act to issue certain stock.

This is the seventh pleading filed with the Commission this year by Phillips, or one or more of his co-petitioners, opposing applications by Alleghany. Basically, it is not inaccurate to say that this group opposes anything which Alleghany seeks to do. All pleadings of the group—and the present one is not an exception—have been as long on charges as they have been short on facts. Some of the past pleadings have, in our opinion, been filed out of time. None has, in our opinion and as our past oppositions have ar-

gued, disclosed an interest of petitioners adequate to give them standing to intervene. Many of the pleadings have adopted self-contradictory arguments.

[fol. 716] Nevertheless, despite the harassment of being constantly called upon to refute repeated charges, we consider seriatim the seven points in this seventh petition.

1. Petitioners first argue that "jurisdiction of the Commission was improperly obtained by Alleghany", and that "Alleghany is not lawfully a carrier" within the meaning of Section 5(3) of the Interstate Commerce Act. Clearly, this is a collateral attack on the Commission's Report and Order in *Louisville & Jeffersonville Bridge and Railroad Company Merger*, Finance Docket No. 18656. The Commission has recently (May 24, 1955) and correctly decided this issue and we deem it unnecessary and inappropriate to labor the point further.

2. Petitioners' second point is that the Exchange Offer has expired by its own terms, and that the application has therefore become moot. The argument rests primarily on the notion that the Order of May 26, 1955 is the order of Division 4 only, and not of the Commission, and accordingly does not comply with the condition of the Exchange Offer that "the Interstate Commerce Commission shall have—issued, on or before May 31, 1955, an appropriate order granting the Corporation's application." (Exchange Offer, page 2, Ex. 18 to Application.)

Petitioners' argument is manifestly in square collision with Section 17 of the Interstate Commerce Act. Paragraph 4 of that section provides that "a division—shall have authority to—determine, order—report, or otherwise act as to any work, business or functions assigned or referred thereto—and with respect thereto shall have all [fol. 717] the jurisdiction and powers conferred by law upon the Commission—. The secretary and seal of the Commission shall be the secretary and seal of each division—[A]ny order—of a division—with respect to any matter so assigned or referred, shall have the same force and effect, and may be made and evidenced in the same manner as if made or taken by the Commission."

In this case, both the Report and Order of May 26, 1955, are the acts of the Commission, are signed as the acts of the Commission by its secretary, and are sealed with the Commission's seal. It is beyond argument that the condition of the Exchange Offer was fully met; the Commission did issue an "appropriate order" prior to May 31, 1955. In any event, whether the condition of the Exchange Offer was met would appear to be a problem initially and primarily for determination by the applicant. Alleghany wishes to inform the Commission that it has accepted the May 26 Order as fulfilling the condition of the Exchange Offer.

Petitioners are equally erroneous in their further contention that, since the effective date of the Order was ten days from and after its date, the Order failed to fulfill the above-quoted condition of the Exchange Offer. An appropriate authorization granting Alleghany's application was entered on May 26. A postponement of the operative date did not alter the fact that May 26 was the date of issuance of an "appropriate order."

3. Petitioners' third point asserts that they were denied due process of law, but fails to specify precisely what [fol. 718] rights they conceived that they had or how they conceive that these rights were infringed. A vague allegation that Division 4's disposition of Alleghany's application deprived them of due process of law does not, of itself, merit refutation. They do complain that an order permitting their intervention was "withheld" from them and not served until Division 4 rendered its decision. But they make no statement as to how they were prejudiced thereby, and obviously they could make none. Their pleadings were before Division 4 and were fully considered (Report and Order of May 26, Sheets 19 and 20).

Petitioners had no statutory right to a hearing on their allegations and do not assert that they had. Rather, again they fall back on the vague allegation that a "plenary hearing before the full Commission is required in the interests of justice." They continue that, in the light of their sworn pleadings, it was erroneous "for Division 4 to have acted on the mere application of Alleghany unsworn to by any officer having or claiming knowledge of the material facts."

Division 4 had before it Alleghany's 126-page application, packed with facts and disclosing in the minutest detail all possibly relevant information about the Exchange Offer. The application was—Petitioners to the contrary—sworn to by Alleghany's secretary. Division 4 also had before it a bare two pages of allegations by Petitioners in its March 23, 1955 pleading, attacking the Exchange Offer on such grounds as that "the public interest and the interest of stockholders will be subverted" by approval of the Exchange Offer. As to this pleading, Division 4 correctly noted that "their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair" (Sheet 19).

[fol. 719] Division 4 nevertheless considered the charges made by Petitioners. It concluded that nothing contained in their petition left any unresolved questions of fact or otherwise warranted the assignment of the application for hearing. In so concluding, Division 4 was clearly correct and committed no error.

Attention is invited to Petitioners' violent and scandalous language on page 6. They assert "Young, Kirby and Alleghany appear to enjoy a special status before Division 4, which apparently requires [them?] neither to prove any case in which they have an interest by reliable, probative and substantial evidence, subject to cross-examination." They proceed to assail Division 4 in abusive language for having no knowledge—*mirabile dictu*—of *lawsuits brought by Petitioners* about which it would seem obvious they would have informed the Division if Petitioners considered they had significant relevance and materiality. The language is then used that Division 4 "apparently takes no steps to inform itself" and is "the least informed expert on the matters with which it is most concerned."

Division 4 needs no defense by us. The Commission has the power and ability to deal appropriately with those who deal contemptuously with it. In our opinion, this language quoted above raises the only serious issue which the petition presents. It is not an issue relevant to approval of Alleghany's application.

4. Point 4 of the petition is adroitly designed to suggest that the Exchange Offer unfairly and illegally discrimi-

nates in favor of the holders of Series A Preferred at the expense of holders of common.

[fol. 720] We invite the Commission's careful scrutiny and analysis of the technique here employed by Petitioners. The full flavor of unconscionable discrimination is suggested by the heading which reads: "The May 31st Market Quotation of $292 Per Share of the Series A Preferred Is Prima Facie Evidence of the Impropriety of the Plan, Since the Stock's Maximum Legal Claim Was $237, as of May 1, 1955." And yet, Petitioners nowhere make the direct charge of discrimination. More importantly, they devote no single line to analysis of the Exchange Offer in terms of relative benefits to holders of preferred and common. (The reference to "preferred", here and hereafter, is to the outstanding Cumulative 5½% Preferred Stock Series A, unless otherwise indicated.)

The Exchange Offer will be found, on examination, to be carefully and conscientiously designed to deal equitably with both classes of stock. As Division 4 properly noted, any plan which did involve discriminatory features might be expected to encounter rough weather from the class discriminated against, rather than to receive the overwhelming approval which each class accorded it. Moreover, the pattern of stock ownership by Alleghany's principal officers provides, for the cynically-minded, unusual assurance of an intent to balance equities as between preferred and common holders. Alleghany's Board Chairman has a substantial direct interest in preferred and a substantial indirect interest in common, while Alleghany's President has a predominant (and heavy) interest in common.

The key to the Exchange Offer is, of course, the right granted to present preferred holders ultimately to convert [fol. 721] their holdings into common. It is this conversion feature which renders the exchange attractive to present preferred holders and injects value into the proffered new series of preferred.* It is the conversion ratio—that

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* Stripped of the conversion feature, holders of Series A Preferred Stock of $100 par value would be offered merely the right to exchange each share for 10 shares of new

is, the number of shares of common which may be received for each share of preferred—which is crucial in determining the relative equities as between preferred and common holders.

In essence, the Exchange Offer comes to this: each holder of preferred is offered the right to $237 worth of common stock, computed on the basis of the closing market price of common on the day preceding the Order of the Commission approving the Exchange Offer (May 25). The $237 represents the call price of the preferred plus accumulated unpaid dividends; that is, the legal claim of the preferred as is recognized even by Petitioners. Certainly the preferred is entitled to compensation in an amount at least equal to their legal claim. Viewed in detail, the Exchange Offer is more complicated than we have stated it, but its working complications should not obscure the essential result.**

[fol. 722] Thus, if Petitioners attack the Exchange Offer as unfairly discriminatory in favor of the present preferred,* what they are really attacking, and should concen-

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preferred stock of $10 par value. They would be offered no return or compenation (beyond a ½% increase in the dividend rate) for an exchange in which they would surrender their claim to back dividends.

** The actual Exchange Offer, rather than its stripped-down essence given above, works in this fashion: holders of present preferred are offered the right to exchange each present share of $100 par value for 10 shares of new 6% Convertible Preferred Stock of $10 par value. Holders of the new preferred may then, by paying $3.75 per each share of common to be received, convert each new preferred share into such number of common shares as is obtained by dividing 23.7 by the market price of common at the closing date less $3.75. The upshot of the plan, when its details are boiled away and it is recognized that $3.75 in cash must be paid for $3.75 worth of common, is still as we put it: viz., the holder of one preferred share gets $237 worth of common.

* Although both Phillips and Gilbert attended the special meeting of stockholders on February 8 neither voiced an opinion that the Plan was unfair to the common.

trate upon, is the convertibility plan. But, as to this, they say no word. Instead, they call attention to the market price of the preferred at a time when it had climbed to $292 per share. And they overlook that the preferred and common stocks were, in effect, married upon a basis of recognizing that the preferred had a claim of $237.

Petitioners are utterly fallacious in suggesting that the closing price of $292 on May 31 for the preferred establishes a *prima facie* case of discrimination in favor of the preferred. Because of the conversion feature, the value of the preferred becomes, under the Exchange Offer, a function of the value of the common. As of May 31, rights under the Exchange Offer were fixed, and its implications carried the preferred to a market value which was pure and simple reflection of the then market value of the common.

What occurred and accounts for the then $292 price of the preferred is quite plain. Alleghany's application contemplated that the effective date for applying the conversion formula should be the fifth day after the date of this Commission's approval of the Exchange Offer. Division 4 modified this aspect of the plan. Believing that the selection of a future date might make possible manipulation of common stock prices, and that preferred holders were entitled to determine earlier the conversion ratio (Sheet 21), [fol. 723] Division 4 fixed the last day preceding the date of its Order as the date for determining the conversion ratio.

Rights thus became fixed as of May 25 on which day Alleghany common closed at 8¾ on the New York Stock Exchange. This meant that a preferred stockholder would be able to obtain 47 shares of common for each share of preferred (plus a fractional adjustment of $2) upon payment of $176.25 (i.e., 47 x $3.75). This may be arithmetically stated as follows:

$$\$8\tfrac{3}{4} \times 47 = \$411.25 + \$2 = \$413.25 - \$176.25 = \$237.$$

Obviously thereafter the value of the preferred would vary with the price of the common. On May 31, Alleghany common closed at 9½. Since a preferred shareholder could obtain 47 shares of common worth $9.50 per share (plus $2 in cash) by paying $176.25, a preferred share should

have been worth approximately $466.50 plus $2 minus $176.25 equals $292.25. The actual price, as Petitioners point out but should not find surprising, was $292.

Petitioners' pointing to the $292 price of preferred on May 31 as evidence of discrimination in its favor is thus in the realm of fantasy. It is a fallacious half-truth to suggest that because the market value of the preferred went up following approval of the plan the preferred received more than it was entitled to. When the plan took effect, the preferred stock could be appraised realistically only in terms of the market value of the common. The whole truth is that the market price of the common went up following the Offer's approval, and, therefore, the market value of the preferred went proportionately higher.

Petitioners veneer their argument on this point by reference to cases arising under the Bankruptcy Act, the Public Utilities Holding Company Act, and Section 5(2) [fol. 724] of the Interstate Commerce Act.* In each cited instance the Supreme Court considered the implications of the so-called "full priority rule" in connection with contentions by senior bondholders or preferred stockholders that they were given less than the equitable equivalent of their claim. Since Petitioners here argue—not on behalf of preferred stockholders that they received too little, but on behalf of common stockholders that preferred holders received too much—it is difficult to see how the cited cases are apposite to the present situation. If Petitioners intend to suggest that these cases, though arising under different statutes and presenting quite dissimilar problems, may nevertheless be taken as broad general authority that, under a Section 20a stock issuance, all stockholders must be treated equitably and non-discriminatorily, our short answer is that Petitioners have totally failed to disclose any manner in which the Exchange Offer is unfair or inequitable as between classes of stockholders.

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* They are, respectively, *Group of Institutional Investors* v. *Chicago, M., St. P. & P.R. Co.*, 318 U.S. 523, 63 Sup. Ct. 727; *Otis & Co.* v. *Securities & Exchange Comm.*, 323 U.S. 624, 65 Sup. Ct. 483; *Schwabacher* v. *United States*, 334 U.S. 182, 68 Sup. Ct. 958.

The benefits to the common stockholders flowing from the Exchange Offer are readily apparent. The common stock is placed upon a current basis, permitting payment of dividends to the common at any time, and prior dividend arrearages are removed without payment of any cash by Alleghany. The net asset value of the common is increased substantially ($3.70 per share). To the extent Convertible Preferred shares are converted into common, the present common stockholders gain the advantage of having $3.75 [fol. 725] paid in cash to Alleghany for each new share of common issued, and the priority rights of the preferred stock will be eliminated. Division 4 went very thoroughly into these and other ramifications of the Exchange Offer, and they found no element of inequity in the plan.

The argument that the subsequent sharp advance of the preferred shows discrimination in its favor is thoroughly specious. It advanced only because the common did. The fact that the common advanced (carrying along the preferred which is tied to it) shows the wisdom and soundness of the Exchange Offer. Petitioners' complaint that preferred now sells above $237 is a complaint against their own interest as common stockholders. If the common, now selling around 10, were to fall back to 8¾ or under, the preferred should then sink to about $237 or lower.

5. The thrust of Petitioners' fifth point is difficult to fathom. While it includes such words and phrases as "fraud", "overreaching conduct", and "absence of arms-length bargaining", there is no coherent statement disclosing precisely what is here complained about. Apparently, this point is related to the prior assertion that the Exchange Offer accords discriminatory favoritism to Alleghany preferred shareholders and, if so, it has been previously answered.

It is further difficult to apprehend what Petitioners have in mind in adverting to the "absence of arms-length bargaining." Division 4 quite properly noted that the Exchange Offer was submitted to a vote of common stockholders who overwhelmingly approved it. This gave them something more than the right to bargain, namely, the ultimate right to approve or reject.

[fol. 726] It is less than candid to say only, as Petitioners do, that 70% of the common stockholders voted to approve

the plan—without adding that over 97% of the shares voted were voted in favor of the plan. It is inaccurate to characterize the voting stockholders as being uninformed of the issues. They were furnished with full details of the Exchange Offer in material cleared by the Securities & Exchange Commission.

6. Petitioners' next to last point consists in the simple assertion that Division 4's approval was illegal in that Petitioners disputed the facts of the application wherefore there was "no evidence, substantial or otherwise" to support the Order. As we discussed, *supra* page 4, Division 4 had before it in Alleghany's application voluminous and minutely detailed facts about the Exchange Offer. It also had before it several pages of charges and allegations of Petitioners couched in generalities. Division 4 nevertheless carefully considered the record before it and reached a conclusion compelled by that record.

7. In the light of all the equities, of the campaign of harassment which Petitioners have pursued, of the length of time the application has been pending, and of the interests of Alleghany and its stockholders, we submit that there are adequate reasons why this Commission should not stay any Order denying the Petition for Reconsideration. Grant of a stay is a discretionary matter, to be granted or denied in accordance with equitable considerations. Petitioners are hardly here in a position to appeal [fol. 727] to this Commission's sense of equity for discretionary relief to ease their path for further harassment of Alleghany and its stockholders.

Respectfully submitted, Alleghany Corporation, By (S.) Edward K. Wheeler, Its Attorney.

June 10, 1955.

Of Counsel: Wheeler & Wheeler, 704 Southern Building, Washington 5, D. C.

CERTIFICATE OF SERVICE (omitted in printing)

[fol. 728] BEFORE THE INTERSTATE COMMERCE COMMISSION, GENERAL SESSION

Finance Docket No. 18866

ALLEGHANY CORPORATION STOCK

ORDER DENYING RECONSIDERATION—June 22, 1955

Upon consideration of the record in the above-entitled proceeding, the petition filed June 2, 1955, by Breswick & Co., et al., requesting reconsideration of the report and order by division 4, filed and entered herein May 26, 1955, and applicant's reply to the petition; and

It appearing, That the alleged "Protective Committee for Common Stockholders of the Alleghany Corporation", which joined in the said petition and prayed for leave to intervene herein, is not a party of record and is not entitled to file a petition for reconsideration, and has not complied with the Commission's General Rules of Practice and the provisions of its order, by division 4, of August 9, 1946 (49 C.F.R. 56.3 (d)), relating to petitions for leave to intervene; and

It further appearing, That the material matters set forth in the petition were considered by division 4 and discussed in its report, and that the petition presents no facts or arguments which warrant reconsideration:

It is ordered, That all references to the said alleged protective committee contained in the petition be, and they are hereby, stricken therefrom; and

It is further ordered, That the said petition be, and it is hereby, denied, and that the said order of May 26, 1955, by division 4, shall be effective as of the date hereof.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 729] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & COMPANY, ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL., Defendants

Before: Frank, Circuit Judge, and Dimock and Walsh, District Judges.

FINAL JUDGMENT—December 23, 1955

This action, to enjoin and set aside certain orders of the Interstate Commerce Commission and to enjoin Alleghany Corporation, having come on for final hearing on September 14 and 15, 1955, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on November 18, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion and its supplemental opinion of December 23, 1955, findings, and conclusions, it is

Ordered, adjudged and decreed that the orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, entered in Finance Docket Nos. 14692 and 18656, be and they hereby are enjoined, set aside, annulled and voided except in so far as they approved and authorized the merger of the Properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, for ownership, management and operation, and through ownership of the stock of the latter [fol. 730] company, control of the said properties and franchises by the New York Central Railroad Company; and the inclusion of the properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company by

modification under the lease of January 2, 1930, between the New York Central Railroad Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, respecting operation of the properties of the latter; and it is

Further ordered, adjudged and decreed that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

Further ordered, adjudged and decreed that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof, and it is

Further ordered, adjudged and decreed that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date [fol. 731] hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon the filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further suspended until the issuance of a mandate from the Supreme Court of the United States, and it is

Further ordered, adjudged and decreed that the stay

pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany, its transfer agents, officers, directors, servants or emloyees, and it is

Further ordered, adjudged and decreed that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany, its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock issued prior to the stay granted by Mr. Justice Harlan.

Jerome N. Frank, United States Circuit Judge; E. J. Dimock, United States District Judge; Lawrence E. Walsh, United States District Judge.

At New York, N. Y. in said district, on December 23, 1955.

[fol. 732] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER FURTHER AMENDING THE ORIGINAL AND SUPPLEMENTAL COMPLAINTS, ETC.—December 23, 1955

At New York, New York, in said District on December 23, 1955.

Plaintiffs above named having moved, by notice of motion dated August 29, 1955, for an order further amending the original and supplemental complaints herein so as to allege in form therein set forth that plaintiffs sue on behalf of themselves and all other common stockholders of Alleghany Corporation similarly situated; Adelaide Neu-

wirth having moved in open court for an order granting her leave to intervene herein as a party defendant; Myron Neisloss having moved by order to show cause dated September 6, 1955, for an order granting him leave to intervene herein as a party plaintiff on behalf of himself and other stockholders similarly situated, and defendant Salwyn Shufro having moved by order to show cause dated August 18, 1955, for an order (1) granting him leave to intervene herein on behalf of his firm, Shufro, Rose & Co., and in behalf of all holders of the 6% convertible preferred [fol. 733] stock of defendant Alleghany Corporation similarly situated, (2) vacating the temporary injunction issued herein dated July 26, 1955, and (3) requiring plaintiffs to post a bond indemnifying said Shufro and others; it is

Ordered that

(a) Plaintiffs' motion for an order further amending the original and supplemental complaints herein be and it hereby is in all respects granted;

(b) The motion of Adelaide Neuwirth for an order granting her leave to intervene as party defendant herein be and it hereby is granted in all respects without prejudice to any proceedings had herein prior to the making of said motion;

(c) The motion of Myron Neisloss for an order granting him leave to intervene herein on behalf of himself and other stockholders similarly situated is granted without prejudice to any proceedings had herein prior to the making of said motion;

(d) The motion of defendant Shufro to intervene herein in behalf of his firm, Shufro, Rose & Co., and in behalf of all holders of the 6% convertible preferred stock of defendant Alleghany Corporation similarly situated be and it hereby is in all respects granted without prejudice to any proceedings had herein prior to the making of said motion;

(e) The title of this action be and it hereby is amended to read as follows:

"UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

x

BRESWICK & CO., RANDOLPH PHILLIPS AND MYRON NEISLOSS, as common stockholders of Alleghany Corporation individually and in behalf of all other common stockholders [fol. 734] of Alleghany Corporation similarly situated, Plaintiffs

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, Alleghany Corporation, The New York Central Railroad Company, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner, and Alvin J. Delaire, a copartnership doing business as Gruss & Co., Samuel A. Mehlman, Salwyn Shufro, individually and on behalf of his firm, Shufro, Rose & Co., and in behalf of all holders of the 6% Convertible Preferred Stock of Alleghany Corporation similarly situated, Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman as Trustee under a deed of trust dated November 6, 1943, Edward Gornish and Adelaide Neuwirth, Defendants.

x"

and

(f) Defendant Shufro's motion for an order vacating the temporary injunction issued herein dated July 26, 1955, and requiring plaintiffs to post a bond indemnifying said Shufro and others be and it hereby is in all respects denied.

——, U. S. C. J., E. J. Dimock, U. S. D. J., Lawrence E. Walsh, U. S. D. J.

[fol. 735] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION OF ALLEGHANY CORP., TO AMEND JUDGMENT OR, IN THE ALTERNATIVE TO GRANT A NEW TRIAL—Filed December 31, 1955

Comes now Alleghany Corporation, by its attorneys, and respectfully requests the Court to reconsider and amend its judgment of December 23, 1955, pursuant to Rule 59(e) insofar as it enjoins, sets aside, annuls and suspends the orders of the Interstate Commerce Commission dated May 26, 1955 and June 22, 1955 entered in Finance Docket No. 18866, or, in the alternative, to grant a new trial under Rule 59(b), and the Court is respectfully requested, if it deems advisable, to set a date for the hearings of these matters mentioned in this motion.

In support thereof, Alleghany shows the following:

1. In its decision of November 18, 1955 the Court held that since Alleghany was not within ICC regulation when it proposed to issue the new preferred stock, the orders of the ICC approving and authorizing the issuance of the stock must be set aside as null and void. The Court's conclusion that the ICC lacked jurisdiction to issue the above orders was based primarily on its finding that the application filed by New York Central and Alleghany under Section 5(2) to acquire control of the Louisville & Jeffersonville Bridge & Railroad Company, Finance Dockets 14692 and 18656, did not afford a proper basis for the Commission to consider Alleghany a carrier under Section 5(3) and accordingly it lacked jurisdiction to approve the preferred stock exchange offer. We believe the Court erred in so concluding, but even if the Court was correct in concluding that the L & J Bridge application did not afford the ICC a basis for subjecting Alleghany to regulation, a proper basis for such regulation and therefore for jurisdiction to approve the exchange offer, Finance Docket 18866, did exist at the time the ICC's orders were entered. The alternative basis for jurisdiction is found in the ICC order in *Boston and*

Albany Railroad Company, et al. Control, Finance Docket [fol. 736] 18789, decided March 22, 1955.* This order of the Commission granted an application by New York Central and Alleghany Corporation filed December 17, 1954, by which New York Central and Alleghany Corporation applied for authority under Section 5(2) of the Interstate Commerce Act for the former, and through it the latter, to acquire control of the Boston & Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation, and the Ware River Railroad Company, through ownership of their stock. Alleghany also requested that it be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11) of the Act as provided by Section 5(3) thereof. Alleghany asserted that it had acquired control of Central as a result of a proxy contest and that it had voting rights to 879,400 shares of Central stock, or approximately 14% of the total outstanding shares of the Central. The application also stated that Alleghany joined in it pursuant to *U. S.* v. *Marshall Transport Co.*, 322 U.S. 31, and prior decisions of the Commission. The application (sworn to by corporate officers of Alleghany and Central) further described the transaction as follows:

> *Boston & Albany Railroad Company* owned about 262 miles of railroad in New York and Massachusetts, having a valuation of about $90,000,000. It had outstanding 250,000 shares of $100 par value stock, of which Central owned none. (Nor did any Central affiliate or subsidiary own any Boston & Albany stock.) The properties of Boston & Albany were being operated by Central pursuant to a lease, dated November 15, 1899, for a term of 99 years (from July 1, 1900), or until 1999. Under this agreement, Central also acquired all right, title, and interest of Boston & Albany

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* We have mailed to the Court three certified copies of the application and the Commission's order which constitute all of the relevant material in the docket of the Interstate Commerce Commission.

in and to all railroads operated by the latter under lease, including the railroads of Pittsfield and Ware River.

The Pittsfield and North Adams Railroad Corporation owned about 18 miles of railroad in Massachusetts, having a valuation of about $1,000,000. It had outstanding 4,500 shares of $100 par value stock, of [fol. 737] which Central (inclusive of affiliates and subsidiaries) owned 722. Its properties were operated by Central pursuant, indirectly, to the Central-Boston & Albany lease and pursuant, directly, to a lease between Boston & Albany and Pittsfield for a term of 99 years from December 1, 1876.

Ware River Railroad Company owned about 50 miles of railroad in Massachusetts, having a valuation of about $1,200,000. It had outstanding 7,500 shares of $100 par value stock, of which Central (inclusive of affiliates and subsidiaries) owned none. Its properties were operated by Central pursuant, indirectly, to the Central-Boston & Albany lease and pursuant, directly, to a lease between Boston & Albany and Ware River for a term of 999 years from January 1, 1874.

The Commission in its report in this proceeding analyzed the transactions and granted the authority as prayed.

With respect to Alleghany's control of Central it stated:

> "... it acquired control of Central in a proxy contest in which Alleghany's slate of nominees was elected as Central's board of directors. The latter's stock is widely held, but Alleghany has an undivided one-half interest in 600,000 shares of such stock and full voting rights with respect thereto under joint venture agreements and, in addition, owns 279,400 shares directly. The voting rights of Alleghany represent approximately 14 percent of the total shares of Central stock outstanding."

It adverted to its L & J Bridge order of March 2, 1955 and stated:

> "*In that proceeding we recognized that control of the Central system had been acquired by Alleghany.* In

our order therein, we held that Alleghany should continue to be considered a carrier subject to the provisions of section 20(1) to (10) inclusive, and section 20a(2) to (11) inclusive, of the act to the same extent as applicable to the New York Central and its subsidiaries and affiliates. . . . The application of Alleghany for authority to control indirectly the carriers involved is predicated upon the necessity for securing our approval of the internal rearrangements of the Central's corporate structure pursuant to the determination of the Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U.S. 31, and by us in *Chesapeake & O. Ry. Co. Purchase, Supra; Nicholas Fayette & Greenbrier R. Co. Lease*, 261 I.C.C. 546, and other decisions. Alleghany, *in addition to its control of Central*, owns $2,879,000, principal amount, of bonds and 396,000 shares of common stock of the Missouri Pacific Railroad Company which presently is in reorganization under section 77 of the Bankruptcy Act." (Emphasis added)

[fol. 738] It is to be noted that the Boston & Albany order intervened between the orders of the Commission in the Bridge case and the exchange offer case. The transactions approved by the Commission's order in the Boston & Albany proceeding were squarely within the scope of Sections 5(2) and 5(3) as interpreted by this Court since there was an acquisition of control of two or more carriers through ownership of their stock. In our view, and that of the Commission, Section 5(3) made it mandatory for the ICC to consider Alleghany a carrier in connection with its approval of the Boston & Albany control transaction if Alleghany were not already subject to regulation. But even if such a finding were not mandatory, the Commission in this order adopted its prior determination in the Bridge order that Alleghany be considered a carrier.*

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* Should any doubt be entertained, and we entertain none, of the correctness of this view, the Court can remand the order in F.D. 18866 to the Commission for a determination of whether its order in the Boston & Albany case, or

In conclusion we urge the Court to take a hard look at the realities of the present situation. The Court has struck down an exchange offer made by Alleghany to its preferred stockholders and approved by overwhelming majorities of both preferred and common stockholders after having been fully and fairly presented to them in material submitted to the SEC prior to dissemination. It has struck down an exchange offer found to be compatible with the public interest by ICC and adjudged by the market place to be greatly in the interest of both preferred and common stockholders. The injunction of the Court has visited and continues to visit great hardship on small share holders who are frozen in the preferred, unable to sell or even hypothecate their stock. It has depressed the market value of the Alleghany common stock to the immediate detriment of those small holders who need funds and cannot wait for ultimate review by the Supreme Court, validation of the exchange offer by the Securities and Exchange Commission or a new plan for the elimination of the large accumulated arrearages on the old preferred. All of these results have [fol. 739] been visited on stockholders who are shocked that a jurisdictional flaw should render their preferred stock unsaleable or depreciate their common stock.

It is respectfully submitted that this Court should not let a curable technical defect deprive thousands of security holders of this highly meritorious exchange offer, the benefits of which to all security holders are so manifest.

In the light of this Boston & Albany case which provides a basis for ICC jurisdiction over Alleghany and accordingly makes unnecessary the harsh results which flow from the Court's present judgment striking down the exchange offer, it is, we submit; the duty of this Court to consider the harm visited on thousands by its present decree.

The Court is also requested to reconsider its judgment in the light of the language in *New York Central Securities*

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that order clarified in the light of this Court's declaration that the Bridge order was a nullity, gave the Commission jurisdiction to regulate Alleghany and approve the exchange offer.

Corp. v. *U.S.*, 287 U.S. 12, that an acquisition of control can take place with respect to a subsidiary of which in excess of 99% of the stock is owned and a further analysis of the decisions of the Interstate Commerce Commission set forth in Appendix 1 of the Court's opinion which we believe will lead the Court to conclude that such decisions are consistent.

We respectfully request the Court to reconsider its judgment and, on such reconsideration, to alter or amend its judgment so as to lift the prohibition against the carrying out of the exchange offer, or, in the alternative, to grant a new trial under Rule 59(b).

Respectfully submitted, White & Case and Wheeler & Wheeler, Attorneys for Alleghany Corporation.

Edward K. Wheeler, David Hartfield, Jr., Of counsel.
Dated December 30, 1955.

[fol. 740] CERTIFICATE OF SERVICE (Omitted in printing)

[fols. 741-742] Secretary's Certificate to following papers omitted in printing.

[fol. 743] BEFORE THE INTERSTATE COMMERCE COMMISSION
IN THE MATTER

of the

Application under Section 5(2) of the Interstate Commerce Act for an order approving and authorizing acquisition by The New York Central Railroad Company and Alleghany Corporation of control of Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation and Ware River Railroad Company through ownership of stocks thereof by The New York Central Railroad Company.

Finance Docket No. —

APPLICATION OF NEW YORK CENTRAL RAILROAD CO. ET AL.—
Filed December 17, 1954

To The Interstate Commerce Commission:

THE NEW YORK CENTRAL RAILROAD COMPANY (hereinafter called the Central) and ALLEGHANY CORPORATION (hereinafter called Alleghany) hereby apply under Section 5(2) of the Interstate Commerce Act for an order of the Commission approving and authorizing the acquisition by them of control of Boston and Albany Railroad Company (hereinafter called the Boston & Albany), The Pittsfield and North Adams Railroad Corporation (hereinafter called the Pittsfield) and Ware River Railroad Company (hereinafter called the Ware River) through ownership of stocks thereof, as hereinafter set forth;

Alleghany joins in this application for the same reason that Alleghany, which formerly had a relationship with The Chesapeake and Ohio Railway Company similar to its present relationship with the Central, joined in the application, pursuant to the direction of the Commission, in Finance Docket No. 6790, *Nicholas, Fayette & Greenbrier R. Co. Lease,* 261 I. C. C. 546, to acquire control of the Chesa- [fol. 744] peake Company's leasehold interest in a new extension. See also *Chesapeake & O. Ry. Co. Purchase,* 261 I. C. C. 239.

In support of this application the applicants show, in accordance with Order dated October 14, 1940:

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CONTENTS OF APPLICATION

(a) Identification of applicant, or of each applicant, if there are two or more applicants, showing:

1. The full and correct names of the applicants are as follows:

The New York Central Railroad Company, and
Alleghany Corporation.

The business address of the Central is 466 Lexington Avenue, New York 17, N. Y., and that of Alleghany is 4500 Chrysler Building, New York 17, N. Y.

2. Each of the applicants is a corporation.

3. The Central is a carrier by railroad subject to Part I of the Interstate Commerce Act. Alleghany is not a carrier by railroad, but by order of the Commission entered on June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. Ry Co. Purchase, supra,* is to be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

4. The owned and leased lines of railroad of the Central are located in the States of New York, New Jersey, Massachusetts, Pennsylvania, Ohio, Indiana, Illinois, Michigan and West Virginia (exclusive of 2.12 miles in Kentucky and 8.18 miles in Missouri, over which it has trackage rights as lessee of The Cleveland, Cincinnati, Chicago and St. Louis Railway) and in Canada.

The owned railroad and physical property of the Boston & Albany is located in the States of Massachusetts and [fol. 745] New York, and that of the Pittsfield and the Ware River is located in the State of Massachusetts.

5. Correspondence with respect to this application should be addressed to Harold H. McLean, General Counsel of the Central, 466 Lexington Avenue, New York 17, N. Y., and to E. K. Wheeler, Southern Building, 15th and H Streets, N. W., Washington 5, D. C., Washington counsel for the applicants.

6. The Central has been engaged as a common carrier by railroad in interstate commerce from a date prior to the enactment of the Transportation Act of 1920.

Alleghany is not engaged and has not been authorized by the Commission to engage as a common carrier by railroad in interstate or foreign commerce. See paragraph 3 above.

(b) Information respecting applicant, or each applicant, if there are two or more applicants, as follows:

1. *If applicant is a corporation:*

(1) The Central was organized and now exists under the laws of the States of New York, Pennsylvania, Ohio, Indi-

ana, Illinois, and Michigan. It was created by consolidation of The New York Central and Hudson River Railroad Company, The Lake Shore and Michigan Southern Railway Company and others under an agreement dated April 29, 1914, which was approved by orders of the regulatory commissions of the States having jurisdiction, and duly filed in the offices of the Secretaries of State of New York, Indiana, Ohio and Illinois on December 22, 1914, in the office of the Secretary of the Commonwealth of Pennsylvania on December 22, 1914, and in the office of the Secretary of State of Michigan on December 23, 1914. By Agreement of Merger dated February 13, 1952, and filed in the above mentioned public offices on June 30, 1952, the Central merged into itself certain other companies (I. C. C. Order dated June 18, 1952, in F. D. Nos. 17700 & 17701).

Alleghany is a corporation incorporated under the laws of the State of Maryland on January 26, 1929. In addition, Alleghany is authorized to do business in the States of New York and Delaware.

[fol. 746] (2) The names and business addresses of the Directors of each of the applicants are as follows:

CENTRAL

Name:		Business Address:
William P. Feeley	399	Fullerton Parkway, Chicago 14, Ill.
Dr. R. Walter Graham, Jr.	1014	St. Paul St., Baltimore 2, Md.
Allan P. Kirby	4500	Chrysler Building, New York 17, N. Y.
William H. Landers	409	Spratt Place, Utica, N. Y.
Frederick Lewisohn	595	Madison Ave, New York, N. Y.
Richard M. Moss	408	Pine Street, St. Louis 2, Mo.
Clint W. Murchison	1201	Main Street, Dallas 1, Texas.
Eugene C. Pulliam	307	North Pennsylvania St., Indianapolis, Ind.
Sid W. Richardson		Fort Worth National Bank, Fort Worth, Texas

Earl E. T. Smith	120	Broadway, New York, N. Y. (Rm. 1710).
Daniel E. Taylor		P. O. Box 551, West Palm Beach, Fla.
Orville Taylor	134	South LaSalle St., Chicago, Ill.
Lila Bell Acheson Wallace		Reader's Digest, Pleasantville, N. Y.
Robert R. Young	230	Park Ave., New York 17, N. Y.
Alfred E. Perlman	230	Park Ave., New York 17, N. Y.

ALLEGHANY

Name		Business Address:
O. Henry Briggs	4500	Chrysler Building, New York 17, N. Y.
Thomas J. Deegan, Jr.	230	Park Avenue, New York 17, N. Y.
Walter W. Foskett	4500	Chrysler Building, New York 17, N. Y.
Henry J. Guild	4500	Chrysler Building, New York 17, N. Y.
Allan P. Kirby	4500	Chrysler Building, New York 17, N. Y.
Herman R. Neff	4500	Chrysler Building, New York 17, N. Y.
Andrew Van Pelt	4500	Chrysler Building, New York 17, N. Y.
Robert R. Young	230	Park Avenue, New York 17, N. Y.

(3) The names, titles and business addresses of officers of each of the applicants, with reference to the Commis- [fol. 747] sion's orders (where required) authorizing them to hold official positions with more than one carrier, are as follows:

Robert R. Young, 230 Park Avenue, New York 17, N. Y., is Chairman of the Board of the Central and Alleghany.

Alfred E. Perlman, 230 Park Avenue, New York 17, N. Y., is President of the Central (I. C. C. order dated July 16, 1954, F. D. No. 17591-Sub. 2).

Karl A. Borntrager, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated April 5, 1950, F. D. No. 16938).

Willard F. Place, 230 Park Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated December 31, 1929, F. D. No. 8014).

Dwight A. Fawcett, LaSalle Street Station, Chicago 5, Illinois, is a Vice-President of the Central (I. C. C. order dated October 3, 1947, F. D. No. 15867).

Lawrence W. Horning, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated June 22, 1943, F. D. No. 14248).

Allan L. Prentice, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated September 20, 1946, F. D. No. 15456).

Garrard W. Glenn, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated July 19, 1954, F. D. No. 18605).

Ernest C. Nickerson, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated July 10, 1953, F. D. No. 17033-Sub. 1).

Arthur E. Baylis, 466 Lexington Avenue, New York 17, N. Y., is a Vice-President of the Central (I. C. C. order dated March 4, 1954, F. D. No. 18079).

Charles T. Ireland, Jr., 230 Park Avenue, New York 17, N. Y., is Secretary of the Central (I. C. C. order dated July 29, 1954, F. D. No. 18610).

[fol. 748] George H. Albach, 466 Lexington Avenue, New York 17, N. Y., is Comptroller of the Central (I. C. C. order dated September 13, 1941, F. D. No. 13436).

Ernest G. Jerome, 466 Lexington Avenue, New York 17, N. Y., is Treasurer of the Central (I. C. C. order dated December 14, 1951, F. D. No. 17571).

Allan P. Kirby, 4500 Chrysler Building, New York 17, N. Y., is President of Alleghany.

Thomas J. Deegan, Jr., 230 Park Avenue, New York 17, N. Y., is a Vice-President of the Central and Alleghany.

David W. Wallace, 4500 Chrysler Building, New York 17, N. Y., is Secretary and Treasurer of Alleghany.

John F. Condon, 4500 Chrysler Building, New York 17, N. Y., is Comptroller and Assistant Secretary of Alleghany.

Edward Y. Baugeard, 4500 Chrysler Building, New York 17, N. Y., is Assistant Treasurer of Alleghany.

(4) The names and business addresses of the ten principal stockholders of record of the Central* as of September 9, 1954, and their respective holdings as of that date are as follows:

Name and Address:	Number of Shares:
Merrill Lynch, Pierce, Fenner & Beane 70 Pine Street New York 5, N. Y.	442,787
Lake & Co. c/o Manufacturers Trust Co. 55 Broad St., New York 4, N. Y.	423,085
Bender & Co. c/o Chase National Bank 18 Pine St., New York 5, N. Y.	240,000
Pershing & Co. 120 Broadway New York 5, N. Y.	205,971

* See also I (b) 7 below (page 13).

[fol. 749]

Name and Address:	Number of Shares:
Francis I. Du Pont & Co. 1 Wall Street New York 5, N. Y.	133,458
Bache & Co. 36 Wall Street New York 5, N. Y.	126,312
Skelton & Co. c/o First Nat'l Bank of Boston Boston, Mass.	104,400
Union Pacific Railroad Company 120 Broadway New York 5, N. Y.	88,257
E. F. Hutton & Co. 61 Broadway New York 6, N. Y.	87,818
Harris, Upham & Co. 14 Wall Street New York 5, N. Y.	76,916

The names and business addresses of the ten principal stockholders of record (of each class) of Alleghany as of April 16, 1954, and their respective holdings as of that date are as follows:

Name and Address:	Number of Shares:
$4 Prior Preferred Convertible Stock	
Jaquith & Company c/o The Marine Midland Trust Company of N.Y. 120 Broadway New York 15, N. Y.	10,450
Klug & Company c/o American National Bank & Trust Company 33 North LaSalle Street Chicago, Illinois	3,000

[fol. 750]

Name and Address:	Number of Shares:
A. M. Kidder & Company One Wall Street New York 5, N. Y.	2,550
Lowell & Company 140 Broadway New York 15, N. Y.	1,000
Mrs. Anita O. K. Young 4500 Chrysler Building 405 Lexington Avenue New York 17, N. Y.	900
D. S. Mathers & Company 135 South Broad Street Philadelphia 7, Pa.	800
Bache & Company 36 Wall Street New York 5, N. Y.	500
Bertram Meyer as Tr. U-W-O Aaron Meyer Selma Lowy Fund c/o Fidelity Union Trust Company Trust Department Newark, N. J.	500
J. W. Sparks & Company 50 Broadway New York 4, N. Y.	500
Herbert Schreiber 47 Kendall Avenue Bellevue Pittsburgh 2, Pa.	400

[fol. 751] PREFERRED STOCK, SERIES A

Name and Address:	Number of Shares:
Alleghany Corporation c/o Manufacturers Trust Company Personal Trust Dept. 55 Broad Street New York 15, N. Y.	7,800
Dorothy F. Vanderslice 25 E. Delaware Place, Apt. 17-C Chicago 11, Illinois	7,400
Jaquith & Company c/o The Marine Midland Trust Company of N. Y. 120 Broadway New York 15, N. Y.	5,900
Klug & Company 33 North La Salle Street Chicago, Illinois	3,938
Merrill Lynch, Pierce, Fenner & Beane 70 Pine Street New York 5, N. Y.	3,930
Granberry & Company 25 Broad Street New York 4, N. Y.	2,900
Carl M. Loeb, Rhoades & Company 42 Wall Street New York 5, N. Y.	2,215
Mrs. Lucy G. Moses c/o Mr. Henry L. Moses 41 Broad Street New York 4, N. Y.	2,200
Baker, Weeks & Harden One Wall Street New York 5, N. Y.	2,120
Dreyfus & Company 50 Broadway New York 6, N. Y.	2,100

[fol. 752] COMMON STOCK

Name and Address:	Number of Shares:
Allan P. Kirby c/o Manufacturers Trust Company Personal Trust Dept. 55 Broad Street New York 15, N. Y.	500,000
Merrill Lynch, Pierce, Fenner & Beane 70 Pine Street New York 5, N. Y.	200,025
Bache & Company 36 Wall Street New York 5, N. Y.	134,672
G. H. Walker & Company 840 Hospital Trust Building Providence 3, R. I.	127,480
Francis I. Du Pont One Wall Street New York 5, N. Y.	101,955
Goodbody & Company 115 Broadway New York 6, N. Y.	59,385
Carl M. Loeb, Rhoades & Company 42 Wall Street New York 5, N. Y.	55,392
Edward L. English 234 Shoreland Building Miami 32, Florida.	51,100
Harris, Upham & Company 14 Wall Street New York 5, N. Y.	50,895
E. F. Hutton & Company 61 Broadway New York 6, N. Y.	46,516

[fol. 753] 2. *If applicant is a copartnership:*

Not applicable.

3. *If applicant is an association or other form of organization, except a corporation:*

Not applicable.

4. *If applicant is a trustee, receiver, assignee or a personal representative of the real party in interest:*

Not applicable.

5. *If applicant is not a carrier:*

(1) See (b) 1. above.

(2) Alleghany's Certificate of Incorporation provides for broad powers to engage in any lawful business. At all times since its incorporation in 1929, Alleghany has been engaged in the investment business, its holdings consisting of corporate securities and, to a large extent, of securities of railroad companies subject to the Interstate Commerce Act.

6. The Central has been engaged in the type of business in which it is now engaged since its formation in the year 1914.

Alleghany has been subject to regulation as a carrier under Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Interstate Commerce Act for the past nine years pursuant to the Commission's order of June 5, 1945, in Finance Docket No. 14692, *Chesapeake & O. R. Co. Purchase, supra.* A request by Alleghany for authority to control through Central the properties and franchises of Louisville & Jeffersonville Bridge and Railroad Company through merger with, in lieu of stock ownership by, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company while continuing its control of Central and its other subsidiaries is presently pending before the Commission in Finance Docket No. 18656, *Cleveland, C. C. & St. L. R. Co. Merger.*

7. In June of this year Alleghany acquired control of the Central as the result of a proxy contest in which the

[fol. 754] slate of directors nominated by Alleghany was elected as the Central's Board of Directors. Alleghany has an undivided one-half interest in 600,000 shares of Central stock with voting rights to said 600,000 shares under joint venture agreements. In addition to said 600,000 shares, Alleghany has 279,400 shares of Central stock. These voting rights of Alleghany represent approximately 14 per cent of the total shares of the Central outstanding. The Chairman of the Board of Directors of Alleghany is Chairman of the Board of Directors of the Central, the President of Alleghany is a Director of the Central, and the Vice-President of Alleghany is a Vice-President of the Central. The Chairman of the Board of Directors of Alleghany and of Central beneficially owns 100,200 shares of Central stock. The President of Alleghany beneficially owns 300,100 shares of Central stock. The voting rights of Alleghany, its Chairman of the Board and its President represent approximately 20 per cent of the total shares of the Central outstanding.

Alleghany is not controlled by any other corporation or corporations.

8. Central, as the parent railroad company, controls other carrier corporations which are members of a group known as the New York Central System (see paragraph 9 below). Alleghany, in turn, controls Central and its affiliated carriers (see paragraph 7 above). In addition to its control of Central, Alleghany also owns $2,879,000 principal amount of bonds and 396,000 shares of common stock of the Missouri Pacific Railroad Company, which is presently in reorganization under Section 77 of the Bankruptcy Act.

9. The Central is the parent railroad company of a group of corporations known as the New York Central System, of which the Boston & Albany, the Pittsfield and Ware River (lessor companies) are members. Central is controlled by Alleghany. The relationship of the lessor companies mentioned and the Central among themselves and to the other members of said group is shown in the Central's annual report to the Commission for the year ended December 31, 1953, under Schedules 104B, 217, 218,

295, 375, 383, 383-A, 411 and 581 (paragraph e), the annual report to the Commission of the Lessors of the Central for said year under Schedules 101, 109, 212 and 217.

[fol. 755] 10. There are no intercorporate relationships material in the present connection not disclosed herein or in the annual reports to the Commission referred to in 9, above, or in reports by Alleghany to the Commission.

11. The applicants have three officers or directors in common as shown in I.(b) (2) and (3) above, namely, Allan P. Kirby, who is a director of both, Robert R. Young, who is a director and Chairman of the Board of both, and Thomas J. Deegan, Jr., who is a Vice-President of both. After the name of each officer shown in I.(b) (3) above, there is a reference to the Commission's order (where required) authorizing the holding of such positions, to which reference is made.

12. The amount of each of the applicants' outstanding stock, by classes, the par value of each share, its voting rights, the total number of stockholders of record (who are the only security holders having voting power) are as follows:

Name of Applicant and Class of Stock:	Number of Shares Outstanding:	Par Value:	Shares having Voting Power of One Vote:	Number of Stockholders (as of close of Aug. 24, 1954):
Central				
Capital Stock	6,447,410.0525	no par	6,447,410	41,606
Alleghany				
$4 Prior Preferred Convertible Stock	25,845	no par	25,845*	169
Preferred Stock, Series A	136,744	$100	136,744*	1,312
Common Stock	4,637,797	no par	4,637,797*	16,499

* The $4 Prior Preferred Convertble stockholders are entitled to vote, as a class, for the election of two directors; the Preferred, Series A, stockholders are entitled to vote, as a class, for the election of two directors; and the Common stockholders are entitled to vote, as a class, for the remaining four directors and on all other matters.

(c) Information respecting the nature of the transaction proposed and the terms and conditions thereof as follows:

1. The proposed transactions, which the Commission is requested to approve and authorize, are the acquisition

by the applicants of control of the Boston & Albany, the Pittsfield and the Ware River through ownership of stocks [fol. 756] thereof by the Central, which proposes to acquire such stocks pursuant to Exchange Offers being made by the Central to the stockholders of said respective carriers, as hereinafter set forth.

2. Such transactions are proposed to be effected by the issue by the Central to stockholders of the Boston & Albany, the Pittsfield and the Ware River of Bonds in exchange for their shares of stock. In brief, the Central is offering, subject to certain conditions, to exchange for shares of stock of those carriers 25-year Collateral Trust Bonds of the Central to be issued under and secured by Indentures, as follows:

> In exchange for each share of Boston & Albany stock (par value $100) Central offers $150 principal amount of its 6% Bonds secured by pledge under the applicable Indenture of one share of Boston & Albany stock and $150 principal amount of Central's Refunding and Improvement Mortgage 5% Bonds, Series C, due October 1, 2013 (hereinafter called the Series C Bonds) for each $150 principal amount of 6% Bonds issued thereunder;
>
> In exchange for each share of Pittsfield stock (par value $100) Central offers $100 principal amount of 5¼% Bonds secured by pledge under the applicable Indenture of one share of Pittsfield stock and $100 principal amount of the Series C Bonds for each $100 principal amount of such 5¼% Bonds issued thereunder; and
>
> In exchange for each share of Ware River stock (par value $100) Central offers $125 principal amount of 5¾% Bonds secured by pledge under the applicable Indenture of one share of Ware River stock and $100 principal amount of the Series C Bonds for each $125 principal amount of such 5¾% Bonds issued thereunder.

The Central is filing with the Commission concurrently herewith an application under Section 20a of the Interstate Commerce Act for authority to issued the proposed 6%, 5¼% and 5¾% Collateral Trust Bonds, in exchange

for shares of stock as proposed, as well as for authority to issue Certificates of Deposit for shares of such stocks deposited pursuant to the respective Exchange Offers and to pledge Series C Bonds under the respective Indentures, as proposed. Attached to that application as exhibits are [fol. 757] copies of the Exchange Offers made to stockholders of the Boston & Albany, Pittsfield and Ware River, respectively, accompanied in each case by form of the applicable Certificate of Deposit, and forms of the proposed Indentures in which are included forms of the proposed 6%, 5¼% and 5¾% Bonds, respectively. In order to avoid needless repetition the applicants herein respectfully make reference to said Section 20a application for complete information as to the terms, conditions and provisions of the Exchange Offers, of the Certificates of Deposits (which are to be issued as a necessary part of the mechanics of effecting the exchanges), of the Indentures and of the Collateral Trust Bonds of the three issues, and for any and all other information contained therein that the Commission may deem relevant to this application under Section 5(2) of said Act.

The transactions proposed are to be made under the authority of Sections 5 and 20a of the Interstate Commerce Act, as amended, and the applicants rely on the provisions of that Act, particularly paragraph (11) of said Section 5, for any and all powers that they might not otherwise have under State laws necessary or appropriate to carry the proposed transactions into effect, and for each of the applicants to exercise any and all control or franchises acquired through said transaction, and for relief from the operation of all laws, restraints, limitations and prohibitions of law, insofar as may be necessary to enable the applicants to carry into effect the said transactions, and to enable each of the applicants to exercise the control or franchises to be acquired by it through said transactions, to the full extent provided by said paragraph (11) of Section 5 of said Section 20a.

3. The Central operates the railroad properties of the Boston and Albany under the terms and provisions of a lease dated November 15, 1899 (as modified by agreement dated September 19, 1900) for a term of 99 years from

July 1, 1900; and by virtue of the provisions of that lease it acquired all right, title and interest of the Boston & Albany in and to all railroads operated by the latter under lease or otherwise, including the railroad of the Pittsfield held under lease dated November 25, 1876, for a term of 99 years from December 1, 1876, and the railroad of the Ware River held under lease dated January 13, 1874, for a term of 999 years from January 1, 1874. The Central [fol. 758] owns no shares of capital stock of any of the three other carriers named in this paragraph, with the exception of 722 shares of stock of the Pittsfield. Except as above stated, there are no financial or other relationships, direct or indirect, not heretofore disclosed in this application, existing at the present time between the applicants and other parties named in this paragraph.

4. The route of the Boston & Albany extends in a generally easterly and westerly direction between Boston, Mass., and Rensselaer, N. Y., and embraces 199.24 miles of main line and 62.48 miles of branch lines owned. Its principal points of interchange, or connection, with lines of other carriers are: with Central, at Albany, Chatham, Hudson, Rensselaer and Selkirk Yard, all in New York; with the Boston and Maine at Boston, Springfield and Worcester, all in Massachusetts; with the Central Vermont at Palmer, Mass.; with the Delaware and Hudson at Albany, N. Y.; with the Grafton and Upton at North Grafton, Mass.; with the New York, New Haven & Hartford at Boston, Framingham, Milford, Pittsfield, Springfield, State Line, Westfield and Worcester, all in Massachusetts; with the Pittsfield (held under lease) at North Adams, Junction, Mass.; with the Rutland at Chatham, N. Y.; with the Union Freight at Boston, Mass.; and with the Ware River (held under lease) at Palmer, Mass.

The route of the Pittsfield extends in a generally northerly direction from a connection with the Boston & Albany at North Adams Junction, Mass., about 2½ miles east of Pittsfield, to North Adams, Mass., a distance of 18.45 miles. It has no branch. Its principal points of interchange, or connection with lines of other carriers are: with the Boston & Albany at North Adams Junction, Mass., and with the Boston and Maine at North Adams, Mass.

The route of the Ware River extends in a generally

northerly direction from a connection with the Boston & Albany at Palmer, Mass., to Winchendon, Mass., a distance of 49.47 miles. It has no branch. Its principal points of interchange, or connection with lines of other carriers are: with the Boston & Albany at Palmer, Mass.; with the Boston & Maine at Baldwinsville, Ware and Winchendon, all in Massachusetts; and with the Central Vermont at Palmer, Mass.

5. The properties involved in the proposed transactions are all or part of the shares of stock of the Boston & Al- [fol. 759] bany, Pittsfield and Ware River. Under the terms of each of the Exchange Offers, if a sufficient number of the shares of stock of the Boston & Albany, Pittsfield or Ware River are deposited in acceptance of the applicable Exchange Offer to make the Central's holdings (with the 722 shares of stock of the Pittsfield now held) equal to 95% (or such smaller percentage as the Central may determine) of the outstanding shares in each case, such Offer will become effective, provided the other conditions, including the Commission's approval, are also met. The Central will acquire control through stock ownership of each carrier whose stock is involved in an Exchange Offer, if such Offer becomes effective, and will continue to control its railroad property under lease as at present.

6. The values of the owned carrier properties of the Boston & Albany, the Pittsfield and the Ware River, as of the valuation date shown in each case, as found by the Commission, and the net cost of additions and betterments after the date of valuation are, respectively, as follows:

Boston & Albany

Final Valuation as of June 30, 1917, as found by the Interstate Commerce Commission in Valuation Docket No. 1022			$86,566,064.00
Additions and Betterments since date of Valuation June 30, 1917 to October 31, 1954:			
Corporate Account—701:			
Investment in R. & E. as of June 30, 1917	$49,730,668.30		
Additions and Betterments to October 31, 1954	3,476,158.06	$3,476,158.06	
Investment in R. & E. as of October 31, 1954	$53,206,826.36		
Lessee (Central) Account—702:			
Balance as of June 30, 1917	1,710,050.30		
Additions and Betterments to October 31, 1954	Cr. 855,867.19	Cr. 855,867.19	
Balance as of October 31, 1954	854,183.11		
Value as of October 31, 1954			2,620,290.87
			$89,186,354.87

[fol. 760]

PITTSFIELD

Final Valuation as of June 30, 1917, as found by the Interstate Commerce Commission in Valuation Docket No. 1022			$ 995,000.00
Additions and Betterments since date of Valuation June 30, 1917 to October 31, 1954:			
Corporate Account—701:			
Investment in R. & E. as of June 30, 1917	$ 450,000.00		
Additions and Betterments to October 31, 1954	Nil		
Investment in R. & E. as of October 31, 1954	450,000.00		
Lessee (Boston & Albany Account—702:			
Balance as of June 30, 1917	Nil		
Additions and Betterments to October 31, 1954	Cr. 4,508.84	Cr. 4,508.84	
Balance as of October 31, 1954	Cr. 4,508.84		
Lessee of Boston & Albany (Central) Account—702:			
Balance as of June 30, 1917	Nil		
Addtions and Betterments to October 31, 1954	Cr. 365.40	Cr. 365.40	
Balance as of October 31, 1954	Cr. 365.40		4,874.24
Value as of October 31, 1954			$ 990,125.76

[fol. 761]

Ware River

Final Valuation as of June 30, 1917, as found by the Interstate Commerce Commission in Valuation Docket No. 1022			$ 1,160,000.00
Additions and Betterments since date of Valuation June 30, 1917 to October 31, 1954:			
Corporate Account—701:			
Investment in R. & E. as of June 30, 1917	$ 1,115,163.82		
Additions and Betterments to October 31, 1954	Nil		
Investment in R. & E. as of October 31, 1954	1,115,163.82		
Lessee (Boston & Albany) Account—702:			
Balance as of June 30, 1917	Nil		
Additions and Betterments to October 31, 1954	28,522.05	$ 28,522.05	
Balance as of October 31, 1954	28,522.05		
Lessee of Boston & Albany (Central) Account—702:			
Balance as of June 30, 1917	Nil		
Additions and Betterments to October 31, 1954	Cr. 334.59	Cr. 334.59	
Balance as of October 31, 1954	Cr. 334.59		28,187.46
Value as of October 31, 1954			$ 1,188,187.46

7. The policies and practices of the Central with respect to reserves for depreciation and similar reserves are such as are prescribed by the Interstate Commerce Commission.

8. Full information with respect to the values of the shares of stock proposed to be acquired by the Central in exchange for Collateral Trust Bonds is given in the Exchange Offers attached to said Section 20a application, to which reference is hereby made.

9. The shares of stock to be acquired pursuant to the Exchange Offers are to be acquired unencumbered, but will be pledged under the respective Indentures securing the Bonds issued in exchange as set forth in I(c)2, above.

10. Not applicable, no merger or consolidation being proposed.

[fol. 762] (d) Facts and circumstances relied upon to show that the proposed transaction is within the scope of section 5(2)(a) of the Interstate Commerce Act, will be consistent with the public interest, and will otherwise be within the requirements of section 5, particularly:

1. *In case of any proposed transaction:*

(a) The proposed transactions are within the scope of Section 5(2)(a) of the Interstate Commerce Act in that they involve acquisition of control by the applicants, through stock ownership by the Central, of the Boston & Albany, the Pittsfield and the Ware River, all of which, as well as the Central, are common carriers by railroad. The application contemplates a change of existing control in that the Central would control through stock ownership each of the carriers stock of which was acquired through the applicable Exchange Offer, in addition to controlling the properties thereof under lease as at present, and the control of these carriers by Alleghany would likewise be changed. Internal rearrangements of corporate structure require filing of an application under Section 5(2)*. Alleghany joins in this application pursuant to *U. S.* v. *Marshall*

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* *Chesapeake & O. Ry. Co. Purchase,* Finance Docket No. 14692, *supra.*

Transport Co., 322 U. S. 31, and prior decisions of the Commission**.

(b) The proposed transactions will be consistent with the public interest and will otherwise be within the requirements of Section 5 for the reasons hereinafter stated.

(1) The proposed acquisitions of control through stock ownership is in accord with the declared policy of the Commission to encourage unifications as being desirable in the public interest.† They will promote the public interest in that they will effect a further integration of these carriers into the Central System. The Commission has recognized that the unification of commonly controlled carriers engaged in transportation is normally desirable because of greater efficiency and economy in operation which, in turn, will inure to the benefit of the shipping [fol. 763] public. In furtherance of plans for improved rendition of service to the public and realization of further economies in operation, it is expected that eventually the carriers, control of which through stock ownership is acquired pursuant to the Exchange Offers, and other system lines will be unified with the Central by merger or otherwise. Prior acquisition of stock control of these carriers, as now proposed, will substantially simplify such further unification of the New York Central System if and when undertaken.

The public interest will also be promoted by the savings estimated to result from such acquisitions of control referred to in the next paragraph, which, to the extent realized, will enable the Central to render better service to the public as a common carrier.

(2) The proposed issue of Collateral Trust Bonds for shares of stock will increase the bonded debt and the fixed interest charges of the Central, but such increases will diminish annually, beginning in 1956, by operation of the liberal sinking fund provisions in the Indentures securing the Bonds and will be more than offset by decreases in net rentals (i. e. gross rentals less the portions thereof com-

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** *Nicholas, Fayette & Greenbrier R. Co. Lease, supra; Chesapeake & O. Ry. Co. Purchase, supra.*

† *Bessemer & L. E. R. Co. Merger*, 275 I. C. C. 167, 179.

ing back to the Central in the form of dividends) and net costs of taxes, with the result that it is estimated that substantial savings will result in the sum total of net rentals, taxes and interest paid in respect of the railroads of the carriers control of which is proposed to be acquired through stock ownership. For example, in the case of the Boston & Albany, it is estimated that the net saving after taxes in the calendar year 1955 over the present arrangement (assuming a 100% exchange effective January 1, 1955) would be approximately $1,139,360. It is estimated that the costs and expenses of effectuating the proposed Exchange Offer will, to a substantial extent, offset this amount. On the basis of an 80% exchange effective January 1, 1955, it is estimated that the net saving after taxes in the calendar year 1955 will be approximately $880,360 in the case of the Boston & Albany. If the Central becomes the owner of 80% or more of the stock of such carriers as a result of the Exchange Offers, consolidated income tax returns can be filed under the Internal Revenue Code of 1954. Filing consolidated returns permits tax savings by elimination of inter-company items. The amount of the savings in net cost of rentals, taxes and interest will de- [fol. 764] pend on the percentage of stock acquired as a result of the Exchange Offers. A full statement of the net savings estimated to result from consummation of each of the three Exchange Offers, according to whether 80% or 100% stock ownership is acquired, is given in item (e) of the Section 20a application above mentioned, to which reference is hereby made. No change in traffic or gross revenues is expected to result from the proposed acquisitions of stock control inasmuch as there will be no substantial change in operations. Net earnings of the Central would be increased to the extent that the savings above referred to are realized and earnings available for fixed charges would be increased accordingly.

(3) The proposed acquisitions of stock control will have no direct effect upon transportation service to the public inasmuch as the railroads of the three carriers' stocks of which are proposed to be acquired are now leased lines of the Central and operation thereof will be continued substantially as at present.

(4) The increase in total fixed charges to result from the proposed transactions will not be contrary to the public interest in view of the over-all savings estimated to result and for the reasons indicated in (1) and (2) above.

(5) The interest of carrier employees will not be affected by the proposed transactions since no material change in operation is involved and no employee is to be laid off by reason thereof.

(6) No guaranty or assumption of payment of dividends or fixed charges is contemplated in connection with the proposed transactions other than the increase in bonded debt and interest charges, which is not inconsistent with the public interest for reasons stated above.

2. *Also, if the proposed transaction involves a railroad:*

(1) The public interest will not be adversely affected by failure to include in the proposed acquisitions of stock control other carriers in the territory involved since the railroads of the three carriers involved are already controlled under leases and are operated by the Central as a part of its system.

[fol. 765] (2) No railroad employee is to be laid off or otherwise adversely affected by reason of the proposed transactions. There is, therefore, no need for imposing any conditions for protection of employees. Accordingly, applicants suggest that the Commission impose only such terms and conditions in that regard as may be required by the provisions of Section 5(2) (f) of the Interstate Commerce Act.

(3) Not applicable, no carrier by water being involved.

II

Required Exhibits (Note 2)

(a) There shall be filed with the original application and as a part thereof, but not with copies, the following exhibits (Note 3):

There are filed with the original of this application and as a part thereof, but not with the copies thereof, or referred to, as indicated, the following exhibits:

Charter and by-laws, with amendments to date, of the respective applicants as follows:

Central:

As to Exhibit A: Certified copy of the Consolidation Agreement and amendatory certificates constituting the charter of the Central have heretofore been filed with the Commission in Finance Dockets Nos. 39, 6436, 8078 and 10406; certified copy of Agreement of Merger, dated February 13, 1952, whereby certain subsidiaries were merged into the Central, was filed with the Commission in Finance Docket No. 17700;

As to Exhibit A-1: Certified copy of the By-Laws of the Central with amendments to date was filed with the Commission in Finance Docket No. 18615, Sub. 1;

Alleghany:

As to Exhibit A-2: Certified copy of Certificate of Incorporation of Alleghany, and all amendments to [fol. 766] date, were filed with the Commission in Finance Dockets Nos. 14692, 17356 and 18162.

As to Exhibit A-3: Certified copy of the By-Laws of Alleghany and all amendments to date, were filed with the Commission in Finance Dockets Nos. 14692, 16214, 16567, 17871 and 17937.

Boston & Albany:

As to Exhibit A-4: Certified copy of the Consolidation Agreement dated November 2, 1870, under which the Boston & Albany was formed as a corporation of Massachusetts and New York by consolidation of Boston and Albany Railroad Company, The Albany and West Stockbridge Railroad Company and The Hudson and Boston Railroad Corporation was filed with the Commission in Finance Docket No. 6863;

As to Exhibit A-5: Certified copy of the By-laws of the Boston & Albany, with all amendments to date, was filed with the Commission in Finance Docket No. 9868.

Pittsfield:

As Exhibit A-6: Certified copy of Massachusetts Act approved March 3, 1842 (Chap. 69 Acts of 1842) incorporating the Pittsfield and of the following amendatory Acts, viz:

Chap. 154 Acts of 1845
Chap. 51 Acts of 1846
Chap. 128 Acts of 1866
Chap. 407 Acts of 1869

are filed herewith.

As Exhibit A-7: Certified copy of the By-Laws of the Pittsfield with amendments to date is filed herewith.

[fol. 767] Ware: River:

As Exhibit A-6: Certified copy of Massachusetts Act approved April 21, 1873 (Chap. 217 Acts of 1873) under which the Ware River was organized is filed herewith.

As Exhibit A-9: Certified copy of the By-Laws of the Ware River with amendments to date is filed herewith.

As to Exhibit B: Certified copies of annual reports of the Central to its Stockholders for the calendar years 1952 and 1953 were filed with the Commission in Finance Docket No. 18656, now pending.

As to Exhibit B-1: Certified copies of annual reports of Alleghany to its Stockholders for the calendar years 1952 and 1953 were filed with the Commission in said Finance Docket No. 18656.

No annual reports to Stockholders were made by the Boston & Albany, the Pittsfield or the Ware River for either of the two calendar or fiscal years preceding the date hereof.

(b) There shall be filed with the original application and with each copy, as a part thereof, the following exhibits:

As to Exhibit 1: Certified copy of resolutions adopted November 23, 1954, by the Board of Directors of the

Central authorizing the proposed transactions (subject to required approval by the Commission) and designating executive officers authorized to make this application to the Commission for its approval and authorization is attached to said Section 20a application as Exhibit 2 thereto, to which reference is made.

[fol. 768] *As Exhibit 1-a:* Certified copy of resolutions adopted November 23, 1954, by the Board of Directors of Alleghany designating the executive officers authorized to make this application, and authorizing other action in the premises is hereto attached.

As to Exhibit 3: Not applicable, all applicants being corporations.

As to Exhibit 4: Not applicable, all applicants being corporations.

As Exhibit 5: Opinion of counsel of the applicants that the transactions described in the foregoing application meet the requirements of the law and will be legally authorized and valid, if approved by the Commission, is hereto attached.

As Exhibit 6: A general or key map indicating the lines of the Central, the Boston & Albany, the Pittsfield and Ware River in their true relation to each other, with other required information shown thereon, is hereto attached.

Three extra copies of said map, unbound, are enclosed with the original application for the use of the Commission.

As to Exhibit 7: See said Section 20a application, attached to which as exhibits are copies of the Exchange Offers (including form of Certificates of Deposit) and forms of the proposed Indentures, which include forms of the proposed Collateral Trust Bonds.

As to Exhibit 8: A general balance sheet statement of each of the applicants and carriers, as of the latest practicable date, is hereto attached, or referred to, as follows:

Central—Included in Exchange Offers attached to said Section 20a application.
Alleghany—Hereto attached, marked Exhibit 8.
Boston & Albany—Included in Boston & Albany Exchange Offer attached to said Section 20a application.
Pittsfield—Included in Pittsfield Exchange Offer attached to said Section 20a application.
Ware River—Included in Ware River Exchange Offer attached to said Section 20a application.

[fol. 769] *As to Exhibit 9:* A copy of income statement and profit and loss statement of each of the applicants (and of each carrier stock of which is involved in the proposed transactions) for each of the last ten calendar years and for the months of 1954 for which the figures are available, is hereto attached, or referred to, as follows:

Central—Included in Exchange Offers attached to said Section 20a application.
Alleghany—Hereto attached, marked Exhibit 9.
Boston & Albany—Included in Boston & Albany Exchange Offer attached to said Section 20a application.
Pittsfield—Included in Pittsfield Exchange Offer attached to said Section 20a application.
Ware River—Included in Ware River Exchange Offer attached to said Section 20a application.

As to Exhibit 10: See statement under I.(b) 9, above, and annual reports to the Commission therein referred to.

As to Exhibit 11: Not applicable, no water carrier being involved.

As to Exhibit 12: Not applicable, no water carrier being involved.

Wherefore, the applicants pray that the Commission enter its order under Section 5 of the Interstate Commerce Act, as amended: (a) approving and authorizing the pro-

posed transactions, namely, the acquisition by the Central and Alleghany of control of the Boston & Albany, the Pittsfield and the Ware River, or any of them, through acquisition and ownership by the Central of shares of capital stock thereof as proposed; (b) according the parties to said transactions all additional corporate powers granted by said Section 5, including full power to carry such transactions into effect; (c) authorizing the Central and Alleghany to exercise any and all control and franchises acquired through said transactions as proposed; all without invoking any approval under State authority; (d) relieving the applicants, their officers and employees, from the operation of the anti-trust laws and of all other restraints, limitations and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to [fol. 770] carry into effect said transactions, and enabling the applicants to own and hold all shares of stock and exercise all control and franchises to be acquired by them, respectively, through said transactions, all to the fullest extent authorized and provided by paragraph (11) of said Section 5; and (e) containing the condition that Alleghany shall continue to be considered a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of the Act, as provided by Section 5(3) thereof.

The New York Central Railroad Company, (S.) W. F. Place, By: W. F. Place, Vice-President.
Alleghany Corporation, (S.) David W. Wallace, By: David W. Wallace, Treasurer.

Dated: New York, N. Y., December 16, 1954.

[fol. 771] *Duly sworn to by W. F. Place, jurat omitted in printing.*

[fol. 772] *Duly swo. to by David W. Wallace, jurat omitted in printing.*

[fol. 773] EXHIBIT 1-A TO APPLICATION

ALLEGHANY CORPORATION

BOARD OF DIRECTORS, Tuesday, November 23, 1954

Resolved: That David W. Wallace, Treasurer of this Corporation be and he hereby is designated as the proper officer of this Corporation to sign, verify and file with the Interstate Commerce Commission application by this Corporation under Section 5 of the Interstate Commerce Act, as amended, in such form as may be appropriate or required (and to which the other corporations hereinafter named, or any of them, may be parties) for the approval and authorization of said Commission of the acquisition by The New York Central Railroad Company of control through ownership of stock of Boston and Albany Railroad Company, The Pittsfield and North Adams Railroad Corporation and Ware River Railroad Company, or any of them.

Further resolved: That the President, Vice President, Secretary, Treasurer or other proper officer of this Corporation, or any of them, be and they are hereby, authorized to execute and deliver, or file, all such requests, certificates, or other papers and do all such other things as may be necessary or appropriate to carry out the intent of the foregoing resolution.

I, JOHN F. CONDON, Assistant Secretary of Alleghany Corporation, hereby certify the foregoing to be true and correct copy of resolutions duly adopted by the Board of Directors of said Corporation, at meeting held at New York, N. Y., on Tuesday, the 23rd day of November, 1954, and that said resolutions still remain in full force and effect.

Witness my hand and the corporate seal of said Alleghany Corporation, at New York, N. Y., this 16th day of December, 1954.

(S.) John F. Condon.

(Corporate Seal.)

[fol. 774] EXHIBIT 5 TO APPLICATION

Opinion of Counsel

To the Interstate Commerce Commission:

As counsel for the applicants in the foregoing application we are familiar with the matter of the proposed acquisition by The New York Central Railroad Company and Alleghany Corporation of control of Boston and Albany Railroad Company, Pittsfield and North Adams Railroad Corporation and Ware River Railroad Company through ownership of stocks thereof by The New York Central Railroad Company for which approval and authorization is sought in the application.

We are of the opinion that the proposed transactions described in said application meet the requirements of the law and will be legally authorized and valid if approved and authorized by the Interstate Commerce Commission.

(S.) Harold H. McLean, Counsel for The New York Central Railroad Company
(S.) Edward K. Wheeler, Counsel for Alleghany Corporation.

New York, N. Y., December 16, 1954.

(Here follows 1 map, Exhibit 6, fol. 775)

Note:

Page 596 A is the map which appears on Card 10.

[fol. 776] EXHIBIT 8 TO COMPLAINT

ALLEGHANY CORPORATION

Balance Sheet as of October 31, 1954
(Unaudited)

ASSETS

Investments at Indicated Market:	
Government obligations	$ —
Corporate securities (other than Mo. Pac. R.R. Co.)	31,791,046
Missouri Pacific Railroad Company	3,168,000
Joint Ventures (50% ownership of securities and 50% notes receivable)	16,594,061
Total Investments	$ 51,553,107
Other Assets:	
Temporary cash investments (at cost)	$ 2,992,720
Cash on deposit and on hand	711,016
Cash collateral under bank loan agreements	—
Notes receivable	13,176,715
Interest income accrued	606,298
Amounts receivable from sales of securities	—
Accounts receivable	425
Office furniture and equipment	33,727
Total Other Assets	$ 17,520,901
Deferred Charges	1,371,812
TOTAL ASSETS	$ 70,445,820

LIABILITIES

5% Sinking Fund debentures (net due 11/1/62	$ 7,496,000
Notes Payable to Banks	14,000,000
Total Debt	$ 21,496,000
Interest on debentures and bank loans	42,349
Liability for Federal taxes on income	42,236
Others	142,875
Total Accounts Payable and Accrued Liabilities	$ 227,460

Capital Stock:	
Prior preferred (net outstanding)	$ —
$4 prior preferred (net outstanding)	2,067,600
Preferred, Series A (net outstanding)	13,674,400
Common (net outstanding)	4,637,797
Total Capital Stock	$ 20,379,797
Paid-in surplus	107,118,632
Earned surplus (deficit)	(78,776,069)
Total Surplus	$ 28,342,563
TOTAL LIABILITIES	$ 70,445,820

[fol. 777] EXHIBIT 9 TO COMPLAINT

To the Interstate Commerce Commission:

JOHN F. CONDON, Comptroller of Alleghany Corporation, makes oath and says that the income and profit and loss statement of said corporation for the calendar years 1949, 1950, 1951, 1952 and 1953 and the first ten months of 1954, a copy of which is hereto attached, is a true and correct statement of the matters and things therein set forth, to the best of his knowledge and belief.

New York, N. Y., December 16, 1954.

(S.) John F. Condon.

Subscribed and sworn to before me this 16th day of December, 1954.

(S.) John F. Harley.

Notary Public, State of New York, No. 30-1677050. Qualified in Nassau County. Certificates filed in Following offices: County Clerk: New York, Bronx, Register: New York, Bronx, Term expires March 30, 1955.

(Notarial Seal.)

[fol. 778]

ALLEGHANY CORPORATION

Comparative Statement of Income and Profit and Loss for the Years Ended Dec. 31, 1949-1953 and Ten Months Ended October 31, 1954

	1949	1950	1951	1952	1953	Ten Months Ended October 31, 1954 (Unaudited)
Income (Exclusive of Security Transactions):						
Dividends	$2,474,532	$1,654,584	$1,514,292	$1,703,504	$1,579,665	$ 623,904
Interest earned on investments	400,253	517,140	570,871	549,363	238,576	242,265
Other interest and miscellaneous	12,571	17,889	31,854	131,658	202,474	686,453
Total Income	$2,887,356	$2,189,613	$2,117,017	$2,384,525	$2,020,715	$1,552,622
Expenses:						
Interest on debentures and bank loans	$ 459,285	$ 504,845	$ 571,080	$ 768,162	$ 934,050	$ 735,402
Other interest paid	—	—	—	70,634	—	—
Amortization of debt expense	12,046	1,895	5,297	6,316	29,728	11,827
Administrative and general expenses	396,698	302,998	356,661	411,589	547,605	592,258
Advances and expenses re Missouri Pacific Railroad Company reorganization	36,769	45,467	188,601	196,172	245,110	39,271
Total expenses	$ 904,798	$ 855,205	$1,121,639	$1,452,873	$1,756,493	$1,378,758
Income (exclusive of profit and loss on security transactions) before provision for Federal taxes on income	$1,982,558	$1,334,408	$ 995,378	$ 931,652	$ 264,222	$ 173,864
Provision for Federal taxes on income	113,000	90,000	75,000	70,000	20,000	8,000
Net Income (exclusive of profit and loss on security transactions) transferred to earned surplus deficit)	$1,869,558	$1,244,408	$ 920,378	$ 861,652	$ 244,222	$ 165,864
Profit and Loss on Security Transactions:						
Net gain (loss) on sales of securities	($5,362,673)	$2,006,926	($ 605,037)	($ 158,817)	$6,452,830	$1,952,194
Net gain on joint ventures terminated	—	—	—	209,623	—	—
Net gain (loss) on exchanges of investment securities for Alleghany Corporation preferred stocks	(220,343)	169,071	—	—	—	—
Net Profit (loss) on security transactions transferred to earned surplus (deficit)	($5,583,016)	$2,175,997	($ 605,037)	$ 50,806	$6,452,830	$1,952,194

[fol. 779] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ORDER EXTENDING STAY—January 19, 1956

Whereas, final judgment in this cause was made and entered December 23, 1955, and in part provided a 30-day stay with respect to certain injunctive provisions contained in said final judgment, and which 30-day stay was further extended by said final judgment until the issuance of a mandate by the Supreme Court of the United States, provided any defendant or defendants filed a notice of appeal to the Supreme Court of the United States within said 30 days of the entry of said final judgment; and

Whereas, intervening defendant, Alleghany Corporation, made application requesting the Court to reconsider and amend its judgment of December 23, 1955, or in the alternative to grant a new trial, and for other relief; and

Whereas, other intervening defendants made a similar application; and

Whereas, the Court has not indicated whether it will entertain such applications, or either of them, and whether it will hear the parties thereon, and has as yet made no disposition of such applications; and

Whereas, the above mentioned 30-day stay from the date of entry of final judgment will expire on or about Janu-
[fol. 780] ary 21, 1956

Now, therefore, it is on motion of the Court

Ordered, that the 30-day stay and suspension of injunctive provisions contained in said final judgment of December 23, 1955, be and it hereby is extended to and including ten (10) days after the entry of an order determining the applications above mentioned of Alleghany Corporation and of Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman as Trustee under a deed of trust dated November 6, 1943, and Edward Gornish; and the filing of a notice of appeal by any defendant within said period as extended shall have the same force and effect with respect

to the enforcement of the judgment and the injunctions contained therein as though said notice of appeal had been filed within 30 days from the entry of said final judgment.

Dated: New York, New York, January 19, 1956.

—— ——, U. S. C. J., E. J. Dimock, U. S. D. J., Lawrence E. Walsh, U. S. D. J.

[fol. 781] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & CO. AND RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation, Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, Alleghany Corporation, The New York Central Railroad Company and Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business under the firm name and style of Gruss & Co. and Samuel A. Mehlman, Defendants

OPINION GRANTING APPLICATION FOR INTERLOCUTORY INJUNCTION—July 21, 1955

Before: HINCKS, C.J. and DIMOCK and WALSH, D.J.J.

APPEARANCES:

Rosston, Hort & Brussel, Esqs., Attorneys for Plaintiff Breswick & Co., 141 Broadway, New York 6, N.Y.

George Brussel, Jr., Esq., Eugene G. King, Esq., Of Counsel.

Randolph Phillips, Esq., Plaintiff pro se, 53 East 74th Street, New York 21, N.Y.

[fol. 782] Stanley N. Barnes, Esq., Assistant Attorney General; Hon. J. Edward Lumbard, United States Attorney; Albert Parker, Esq., James H. Durkin, Esq., Special

Assistants to the Attorney General, Attorneys for defendant United States of America.

Samuel R. Howell, Esq., Acting General Counsel; Leo H. Pou, Esq., Associate General Counsel, Attorneys for defendant Interstate Commerce Commission.

White & Case, Esqs., 14 Wall Street, New York 5, N.Y.; Wheeler & Wheeler, Esqs., 704 Southern Building, Washington, D.C., Attorneys for defendant Alleghany Corporation.

Edward K. Wheeler, Esq., David Hartfield, Jr., Esq., Robert G. Seaks, Esq., Andrew O. Miller, Esq., Morton Moskin, Esq., Of Counsel.

Harold H. McLean, Esq., Edward K. Wheeler, Esq., Attorneys for defendant, The New York Central Railroad Company, 466 Lexington Avenue, New York 17, N.Y.

Proskauer, Rose, Goetz & Mendelsohn, Esqs., Attorneys for defendants Gruss & Co., 11 Broadway, New York 4, N.Y.

Harold H. Levin, Esq., Of Counsel.

Samuel A. Mehlman, Esq., Defendant pro se, 165 Broadway, New York, N.Y.

[fol. 783] OPINION

DIMOCK, D.J.

This action was originally brought for an injunction requiring the Interstate Commerce Commission to set aside two of its orders to the extent that they granted the application of Alleghany Corporation to be "considered as a carrier" subject to the provisions of sections 20(1) to (10) inclusive and sections 20a(2) to (11) inclusive of the Interstate Commerce Act, 49 U.S.C. §§ 20(1)-(10) inclusive, 20a(2)-(11) inclusive.

By supplemental complaint and stipulation the scope of the action has since been extended so as to include a prayer for an injunction against the enforcement of two orders of the I.C.C. approving a proposed exchange of preferred stock of Alleghany.

The matter now before this court is an application for an interlocutory injunction vacating the said orders that Alleghany be considered as a carrier and enjoining the en-

forcement of the two orders dealing with the preferred stock.

On September 17, 1954, Alleghany, The New York Central Railroad Company and two subsidiaries of the New York Central, Louisville & Jeffersonville Bridge & Railroad Co. and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as "the Big Four", filed with the I.C.C. an application pursuant to section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2). On [fol. 784] its face, the principal object of the application was to obtain approval for a merger of the Bridge Company into the Big Four. The substantial effect of the granting of the application, however, would have been, as claimed by Alleghany, to constitute Alleghany, pursuant to the provisions of section 5(3), a non-carrier "considered as a carrier" subject to the above-designated provisions of the Interstate Commerce Act for the purpose of the issuance of securities, etc. It is agreed on all hands that, except for the effect of such an order that Alleghany should be "considered as a carrier", it would be an investment company subject to the provisions of the Investment Company Act, 15 U.S.C. § 80a-1 et seq., for the purposes of the issuance of securities, etc. Thus, according to Alleghany's theory, the granting of the application constitutes a determination that Alleghany in issuing securities is subject to supervision of the I.C.C. rather than the Securities and Exchange Commission. The immediate importance of this is in connection with the issuance of a new class of preferred stock pursuant to a voluntary exchange offer authorized by the Alleghany directors, made public on February 2, 1955 and approved by the I.C.C. in the orders under review but not by the S.E.C.

Alleghany filed with the I.C.C. its application for leave to issue the new class of preferred stock on February 18, 1955.

On March 2, 1955, the I.C.C., through its Division 4, approved the merger application and, on May 24, 1955, the [fol. 785] I.C.C. through the whole Commission, affirmed this approval. These two orders of approval are the ones now being reviewed by this court and which were included in the original complaint. Since their effect was the same they will usually be referred to herein in the singular.

On May 26, 1955, two days after the order of the full Commission approving the merger, Division 4 of the I.C.C. approved the issuance of the preferred stock.

On June 6, 1955, the complaint in this action was filed and, on June 15, 1955, plaintiffs made this application seeking a preliminary injunction against enforcement of the jurisdiction assuming orders. Attack on the preferred stock order was postponed prior to the action of the full Commission on the theory that review would be premature.

On June 22, 1955, the entire Commission affirmed the preferred stock order of Division 4. These two preferred stock orders are also now being reviewed by this court but they were added by supplemental complaint. Like the jurisdiction assuming orders they will usually be referred to in the singular.

On June 23, 1955, Alleghany, immediately upon learning of the full Commission's order finally approving the issuance of the preferred stock, began distribution of the new stock pursuant to the exchange offer. That distribution was halted by a temporary restraining order issued by this court but not before more than half of the proposed issue had been exchanged. The effect of that temporary restraining order has been to prevent the transfer of the shares of new preferred stock and consequently to halt trading therein on the New York Stock Exchange. We [fol. 786] are advised that, before trading was actually stopped, there had been sales amounting to 2400 shares of stock.

Since the institution of the proceeding, The New York Central Railroad, Alleghany and two holders of Alleghany preferred stock, Gruss & Co., a copartnership, and Samuel A. Mehlman, have been granted leave to intervene as defendants.

As above indicated, Alleghany's theory is that, as a result of the determination of the merger application, Alleghany obtained the status of a non-carrier deemed to be a carrier for the purpose of coming under the supervision of the I.C.C. for matters relating to the issuance of securities, as distinguished from the status of an investment company coming under the supervision of the S.E.C. for such matters.

The statutory provisions involved are the following:

Interstate Commerce Act, §5, 49 U.S.C. §5.

"*(2) Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

[fol. 787] "*(3) Non-carrier deemed carrier upon acquiring control.*

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions."

At the threshhold defendants make two objections: first, that the jurisdiction assuming order is not reviewable and second, that, even if it is reviewable, plaintiff has no standing to review it.

[fol. 788] *Reviewability of the Orders*

Shannahan v. United States, 303 U.S. 596, is said to be authority against the reviewability of the jurisdiction assuming order. The determination there held to be unreviewable was a finding that the carrier concerned was not an interurban railroad and was therefore subject to certain provisions as to labor dispute mediation.

The Supreme Court in Rochester Tel. Corp. v. U.S., 307 U.S. 125, seemed to disagree with the Shannahan decision on the facts but Justice Frankfurter, at page 131, explained its principle by quoting the statement of Justice Brandeis in United States v. Los Angeles R.R., 273 U.S. 299, 310, to the effect that there can be no review of an order "which does not change the carrier's existing or future status".

Here the status of Alleghany, absent an order of the I.C.C. under sections 5(2) and 5(3) that it should be considered as a carrier subject to the Interstate Commerce Act, was that of an investment company subject to the provisions of the Investment Company Act. The orders sought to be reviewed changed its "existing or future status". Hence the quoted principle of the Shannahan case does not prevent their review.

Justice Frankfurter in the Rochester case, besides quoting from Justice Brandeis, stated the rule for himself as follows, p. 132, "Where a complainant seeks the Commission's authority under the terms of a statute and the Com-
[fol. 789] sion's action is followed by legal consequences *** or where Commission's order denies an exemption from the terms of the statute *** the road to the courts' jurisdiction seems to be clear."

Here the I.C.C. granted an exemption from the terms of the Investment Company Act. That act, by section 3(c)(9), 15 U.S.C. § 80a-3(c)(9), excepts from the "investment company" class, "[a]ny company subject to regulati-n under the Interstate Commerce Act". Section 5(3) of

the Interstate Commerce Act, under which the I.C.C. acted in making the order here, provides that the non-carrier shall, "to the extent provided by the Commission in such order", be considered as a carrier subject to the enumerated provisions of the Interstate Commerce Act. By making Alleghany subject to the Interstate Commerce Act, the I.C.C. exempted it from the Investment Company Act and thereby brought the order within the test for reviewability laid down in the Rochester case.

There is no room here for any idea that might be generated by the Shannahan case that an attempt to review the jurisdiction assuming orders is premature. The jurisdiction has been exercised by the adoption of the order approving the issue of the preferred stock.

Defendants intimate that the order approving the issue of preferred stock is permissive only and that it is therefore unreviewable, citing a statement in Miller v. United States, D.C.S.D.N.Y., 277 F. 95, that an order of the I.C.C. approving the issuance of securities does not direct the [fol. 790] issuance but only puts the carrier in a position where, if the securities are issued they will be valid.* If this statement were intended to lay down a rule that permissive orders of the I.C.C. may not be reviewed, the law has since been settled to the contrary. In New York Central Securities Corp. v. United States, D.C.S.D.N.Y., 54 F.2d 122, aff'd. 287 U.S. 12, a stockholder was allowed to review an order of the I.C.C. which authorized, but did not direct, action by the corporation. Accord: Chicago Junction Case, 264 U.S. 258, 263.

[fol. 791] *Plaintiffs' Standing to Review the Orders and "Irreparable Damage"*

The Investment Company Act, Aug. 22, 1940, c.686, Title I, §§ 1-53, 54 Stat. 789, tit. 15 U.S.C. §§ 80a-1 to 80a-

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* It is to be noted that the question at issue in that case was whether the section regulating approval of securities had been complied with. Here the question is not merely one of compliance with section 20a but whether any order of the I.C.C., under that section or any other, may stand upon its conclusion that Alleghany is to be deemed a carrier under section 5.

52, begins with legislative findings and a declaration of policy. Section 1(b) declares that the "interest of investors" is "adversely affected *** when investment companies are *** operated [or] managed *** in the interest of directors, officers, investment advisors, depositors, or other affiliated persons thereof". That section ends with a declaration "that the policy and purposes of this subchapter *** are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors."

One of the purposes of the Investment Company Act is thus to protect investors in investment companies against the managing of those companies in the interests of persons other than the investors.

The complaint here charges in substance that one Robert R. Young and one Allan P. Kirby are in control of Alleghany and have been conducting Alleghany's affairs primarily in the interest of themselves and a small group of insiders and secondarily in the interest of the other stockholders. It further charges that the application for the orders under review was made at the instance of Young and Kirby for the purpose of escaping the provisions of the Investment Company Act.

[fol. 792] The stockholders here allege that, by obtaining an erroneous ruling from the I.C.C., persons in control of the corporation have succeeded in escaping the provisions of an act passed for the express purpose of protecting stockholders from persons in control. Since the corporation, by hypothesis, is helpless, plaintiffs say that they have standing to sue to prevent the thwarting of the declared will of Congress. We are convinced that a stockholder, who seeks only that which Congress has provided for him as matter of right, need not show money damage to entitle him to sue. It is enough if he shows that no one else will act on his behalf. Here the corporation, which is controlled by those he is attacking and which has sought the ruling to which he objects, will not help him. While it would perhaps be too much to expect of the S.E.C. to engage in a jurisdictional fight with another great administrative body of coordinate standing, the hard fact is

that it has limited its participation to a request to the I.C.C. to surrender part of its jurisdiction as a matter of grace. Moreover no such remedy via the S.E.C. is provided by statute. See Goldstein v. Groesbeck, 2 Cir., 142 F.2d 422.

A plenary action by the stockholders against Alleghany to enjoin the issuance of the preferred stock while the orders of the I.C.C. stand in full force and effect would quite properly be met with the defense that they were collaterally attacking an administrative body's determina- [fol. 793] tion.* The present proceeding, where the I.C.C.'s orders are directly attacked and where as a party it may be heard in their behalf, affords fair play to both sides.

Where the question is that of unlawful usurpation of regulatory control as distinguished from the reasonableness of regulatory action by an agency with conceded jurisdiction, a stockholder has standing to attack an administrative order in which the corporate management has acquiesced even though he cannot show an interest other than a derivative one on behalf of the corporation. See Ashwander v. Valley Authority, 297 U.S. 288. There relief was accorded to stockholders against a "breach of duty [which consists] in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions" (p.319) even when the stockholders sued "in the right of" (p.318) the corporation.

Yet, even if we applied the narrower test as to standing to sue applied where a stockholder challenges the reasonableness of the I.C.C.'s regulation rather than its jurisdiction to regulate at all, plaintiffs have sufficient interest

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* Alleghany did in fact take this position in successfully opposing a preliminary injunction in Breswick & Co. v. Briggs, D.C.S.D.N.Y., 120 F. Supp. 953. It there argued that the I.C.C. determination, if subject to attack by plaintiffs, could only be attacked in a proceeding before a three-judge court to enjoin its enforcement and not collaterally in a stockholders' derivative action against the directors of Alleghany.

[fol. 794] apart from the corporation to give them standing to sue. Indeed what they claim here is a right to protection as stockholders against management regardless of the effect of that protection upon the welfare of the corporation. That which they seek is the right of a stockholder not the right of a corporation.

Stockholders were accorded standing to sue under the Urgent Deficiencies Act to review action of the I.C.C. under section 5(2) in New York Central Securities Corp. v. United States, 54 F.2d 122, *supra*. In that case plaintiff held stock of two kinds: stock of a lessee corporation and stock of lessor corporations. The plan of acquisition involved payment of rent by the lessee corporation to stockholders of the lessor corporations in lieu of dividends. The court held that, as stockholder of a lessee corporation, plaintiff had no standing because "plaintiff cannot have sustained any injury in this respect other than indirectly through the lessee corporation." 54 F.2d 125. "As a minority stockholder of lessor corporations, however, its alleged injury is not merely derivative through its ownership of stock, but is an independent injury to itself as a member of the class created by the leasing agreements between lessors and lessee." 54 F.2d 126.

In Schwabacher v. United States, 334 U.S. 182, stockholders were permitted to review the I.C.C.'s treatment of their class of stock in a merger plan under section 5(2).

The principle was expressed by Brandeis, J., in Pitts-
[fol. 795] burgh & W.Va. Ry. v. U.S., 281 U.S. 479, 487, where he said "Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation."

The complaint of plaintiffs is that the I.C.C. unlawfully extended the management's power to adjust their relations with other security holders. Except for the allegedly unlawful act of the I.C.C. the preferences and privileges of plaintiffs would have been protected by the Investment

Company Act against the manipulation of those in control of the corporation.*

The situation is precisely the same as that in the New York Central Securities case, abstracted above, where the stockholder's standing was upheld. The suing stockholder [fol. 796] was complaining not because it was to receive rentals but because the corporation was not to receive them. That wrong the stockholder suffered in common with all other stockholders yet the court held that the injury was "not merely derivative ***, but *** independent." 54 F.2d 126. In a literal sense nothing could be more derivative than the loss that the stockholder suffered when the I.C.C. permitted the corporation to renounce the right to rent but, in effect, the action of the I.C.C. deprived the stockholders of an independent right to dividends earned by the property of the corporation. So here, it is the whole Alleghany corporation which the I.C.C. has made subject to the Interstate Commerce Act instead of the Investment Company Act but the effect of the action of the I.C.C. is to deprive the stockholders of an independent right not to have their status changed except as permitted by the terms of the Investment Company Act.

Any construction that would identify the interests of these plaintiffs and the corporation would render nugatory the Investment Company Act as an accomplishment of its declared purpose to eliminate the condition that exists when "investment companies" "fail to protect the preferences and privileges of the holders of their outstanding securities". 15 U.S.C. §80a-1(b)(3).

In none of the cases cited by counsel in support of the argument that plaintiffs have no standing did the plaintiffs have such a direct interest in the question as the suitors here. In Pittsburgh & W.Va. Ry. v. U.S., 281 U.S. 479, [fol. 797] *supra*, the plaintiff minority stockholder sought to attack an order permitting the abandonment of a railroad station. In Sprunt & Son v. United States, 281 U.S.

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* The I.C.C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor. See Miller v. United States, D.C.S.D.N.Y., 277 F. 95, *supra*. Cf. Investment Company Act §§1-23, 15 U.S.C. §§ 80a-1 to 23.

249, and Edward Hines Trustees v. U.S., 263 U.S. 143, the plaintiffs were shippers who complained that rates, not attacked as unreasonable, worsened their competitive positions. Merchant Truckmen's Bureau v. United States, D.C.S.D.N.Y., 16 F.Supp. 998, was a similar case where the plaintiff did not even have the qualification of being a shipper. In Moffat Tunnel League v. U.S., 289 U.S., 113, the Supreme Court characterized the plaintiff's interest as "no more than a sentiment". In Miller v. United States, 277 F. 95, *supra*, the plaintiff alleged that he was a stockholder in a railroad whose properties were in process of foreclosure. He was said to be without standing to review an order of the I.C.C. approving issuance of securities of a new corporation for the properties of the old.

It is said that plaintiffs do not show that "legal injury" which is necessary to give plaintiffs standing. We believe that they show legal injury when they demonstrate that, because of an erroneous ruling by the I.C.C. as to their status, they are subject to possible injury from which they would otherwise be protected. The order under review has exempted the management from the restrictions of the Investment Company Act.

The Investment Company Act was adopted for the protection of investors. Congress has declared that an investor in an investment company shall have the protection of the act and the protection of the S.E.C. It is no answer to [fol. 798] tell plaintiffs that they may come out better under the liberal Interstate Commerce Act than under the strict Investment Company Act. The law forbids the management to subject the investor to that hazard.

Of course it cannot be gainsaid that plaintiffs cannot demonstrate that over the years they would fare better as stockholders if Alleghany had to operate under the Investment Company Act rather than the Interstate Commerce Act. That is immaterial, however. The stockholder in the New York Central Securities case, 54 F.2d 122, *supra*, was permitted to raise many points other than its point that the rental was inadequate.

The rule that a plaintiff, to entitle himself to an injunction, must show irreparable damage has no bearing on plaintiffs' right to maintain this action. All that it means

is that they cannot have an injunction if they have an adequate remedy at law.* If plaintiffs have, as we think, this right to invoke the protection of the Investment Company Act against an unlawful assumption of jurisdiction by the I.C.C., they have no adequate remedy at law to vindicate that right.

Plaintiffs' right to a preliminary injunction is a different matter.

To support a preliminary injunction in an injunction suit the plaintiff must show not only that any other remedy [fol. 799] than a final injunction would be inadequate but also that an injunction issued after the time involved in waiting for trial would be inadequate protection. Here, unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers so that an unscrambling, in the event of a determination that the I.C.C. approval was unlawful, would be a practical impossibility. Plaintiffs would then find themselves in the position of common stockholders faced with the possibility of dilution of their interest by conversion of this new preferred stock and yet be remediless in spite of the adjudged illegality of the preferred stock. There can be no doubt that without a preliminary injunction the new preferred stock will be issued since distribution had already begun when halted by the temporary restraining order in this case.

[fol. 800] *The Claim that Alleghany Must Be Considered as a Carrier Irrespective of the Order Under Review*

Defendants make the further point that plaintiffs were not harmed by the determination of the I.C.C. because Alleghany already had the status of being "considered as a carrier".

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* Kerr on Injunctions, 3rd Ed. Chap. III, §1, p.14; Charles C. Wilson & Son v. Harrisburg, 107 Me. 207, 218, 77 A. 787; Smith v. Shiebeck, 180 Md. 412, 24 A.2d 795; Hodge v. Giese, 43 N.J.Eq. 742, 11 A. 484, 487; Columbia College of Music Etc. v. Tunberg, 64 Wash. 19, 116 P. 280, 282; Miles Laboratories v. Seignious, D.C.E.D.S.C., 30 F. Supp. 549.

That claim is based on the fact that, by an order dated June 5, 1945, in Finance Docket No. 14692, Alleghany was given that status. Chesapeake & O. Ry. Co. Purchase, 261 I.C.C. 239. That order was made in a proceeding begun by the C. & O. September 2, 1944, under section 5(2) of the act, for the acquisition of the Norfolk Terminal and Transportation Company. On September 5, Alleghany filed a supplemental application, joining the C. & O.'s application and "seeking approval and authorization under §5(3) of the act of control by it, through the C. & O., of the properties of the Terminal Company", and asked approval of the continuance of Alleghany's relationship with the carriers controlled by it, directly or indirectly, including the C. & O., the Nickel Plate and the Pere Marquette.

In making the order of June 5, 1945, the I.C.C. made, among others, the finding, p.261, that "acquisition by Alleghany Corporation of control, through ownership of stock as above described, of Chesapeake & Ohio, Nickel Plate, Pere Marquette and their subsidiaries and affiliates, is a [fol. 801] transaction within the scope of section 5(2) of the Interstate Commerce Act * * *" and provided in the order that "unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11) inclusive, of the Interstate Commerce Act".

On January 19, 1954, Alleghany divested itself of the C. & O. stock that it had theretofore held. The Nickel Plate stock had been earlier sold and the Pere Marquette merged with the C. & O. Upon the suggestion of those facts the I.C.C. requested Alleghany to show cause why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applied to and provided that Alleghany should be "considered as a carrier". Alleghany responded that it would be ready at a proper time to accept an order terminating its control of the C. & O. and requested that action regarding its status be withheld until the proceedings resulting in the order below could be begun. The I.C.C. allowed Alleghany a period of sixty days for that purpose and the proceedings under review were begun before its expiration.

In the proceedings under review the application alleged that Alleghany had "recently" relinquished control of the C. & O. By the orders under review, the effective portions of the order of June 5, 1945, were expressly terminated and declared to be of no further force or effect.

[fol. 802] Whatever might have been the terms of the order of June 5, 1945, they could not have conferred upon Alleghany qualifications to be "considered as a carrier" which it did not possess. From the instant of Alleghany's relinquishment of control of the C. & O. and the Nickel Plate, plaintiffs here were entitled to the special protection which Congress has provided for stockholders in investment companies which do not control railroads. Although failure to apply for vacation of the order might estop Alleghany, it could not shield it from the S.E.C. and it would not be binding upon such third persons as stockholders of Alleghany. As to all except Alleghany, which had accepted the 1945 order as it read, its provision for regulation by the I.C.C. after the factual basis for I.C.C. jurisdiction ceased, was empty fiat.

Even if the order of June 5, 1945, were effective until terminated, the object of the proceedings below was to substitute control of the New York Central for control of the C. & O. and the Nickel Plate as a basis for declaration of status to be "considered as a carrier". Plaintiffs were entitled to be heard on Alleghany's qualification for that status upon the new basis. Carriers are not interchangeable at will.

[fol. 803] *Failure to Find that Alleghany's Control of the New York Central is "Consistent with the Public Interest"*

A fundamental question presented is whether the I.C.C. was empowered by section 5(3) to direct that Alleghany should be "considered as a carrier" even though Alleghany, in applying for consideration as a carrier, did not seek authority to acquire control of a carrier.

To us it seems that the I.C.C. had no such power. It will be noted that section 5(2) empowers the I.C.C. to authorize transactions of two classes: First, transactions involving carriers alone and, second, transactions where persons which are not carriers are involved in relations

with carriers. "[A] person which is not a carrier" may be authorized "to acquire control of two or more carriers through ownership of their stock or otherwise" and "a person which is not a carrier and which has control of one or more carriers" may be authorized "to acquire control of another carrier through ownership of its stock or otherwise".

When we come to section 5(3), we find that "a person which is not a carrier" may be "considered as a carrier" only when it is authorized by an order under paragraph (2) "to acquire control of any carrier or of two or more carriers".

The jurisdiction assuming order in this case did not authorize Alleghany to acquire control of any carrier or of two or more carriers. What it did was to permit a merger of two carriers which were already controlled by a parent carrier, the New York Central, which is said to be con- [fol. 804] trolled by a non-carrier, Alleghany. The case certainly does not fall within the language of the statute in the ordinary acceptance of words.

The effect of the Commission's position is that whenever a holding company in the position of Alleghany deems it desirable to bring itself within the class "considered as a carrier" it needs only to join with its subsidiaries in applying to the I.C.C. for approval of some transaction such as the merger of a railroad bridge company into one of the subsidiary railroad companies. Such a transaction, as, indeed, the transaction here, is completely without significance so far as concerns the question whether the issuance of securities of the top corporation is subject to the jurisdiction of the I.C.C. or the S.E.C. The prayer for approval of the merger is treated as if it were an effective but meaningless incantation to propitiate a medicine man.

Alleghany and the Commission contend that by administrative interpretation such an intra-system merger subjects the noncarrier parent to I.C.C. regulation pursuant to section 5(3). They rely on Chesapeake & Ohio Railway Company-Purchase, 261 I.C.C. 239, *supra;* Nicholas, Fayette & Greenbrier R. Co. Lease, 261 I.C.C. 546; and Warrior & Gulf Nav. Co. Control, 250 I.C.C. 26. These cases

in turn refer to two others: United Parcel Service of Portland—Purchase—Wiese, 37 M.C.C. 473, and Atchison, T. & S.F. Ry. Co.—Control—Sante Fe Trail Transp., 15 M.C.C. 469. Although these cases show the need for I.C.C. authori- [fol. 805] zation for consolidation under section 5(2), they do not support the present contention that such consolidation between already acquired subsidiaries constitutes "acquisition of control", or that a non-carrier parent not previously subject to section 5(3) becomes subject to that section by such a consolidation. In Chesapeake & Ohio Railway Company-Purchase, *supra*, Alleghany, the non-carrier parent, was held subject to section 5(3) but this was not upon the basis of the intra-system consolidation in that case. It was upon the basis of Alleghany's application for retroactive approval of its acquisition of control over the Chesapeake & Ohio, the Nickel Plate and the Pere Marquette. Neither does Warrior & Gulf Nav. Co. Control, *supra,* constitute such a holding. There the Commission asserted that the acquisition of direct control of a subsidiary in place of indirect control through another subsidiary subjected the non-carrier parent to regulation under section 5(3). It concluded, however, that, because the parent was not primarily in the transportation business, it would not seek to exercise such regulation. Thus, the assertion in that case was but a dictum never put to the test of execution.

By another construction of the statute, also erroneous we think, the I.C.C. has created a situation where a non-carrier may, without approval of the I.C.C. acquire control of a railroad system and then, if and when it suits the non-carrier's convenience to seek refuge with the I.C.C., ask its approval of an intra-system merger and, as a result, obtain a declaration under section 5(3) that the [fol. 806] non-carrier must thenceforth be considered as a carrier subject to the security issuance provisions of the Interstate Commerce Act. This second construction which we think erroneous is the one adopted in the opinion of the full Commission where it said "As Central, at the time of [Alleghany's] acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated

provisions of section 5(2) of the act and that our approval was not necessary."

Under Section 5(2) I.C.C. approval is required for the acquisition of two or more carriers. The statute says "carriers", not "systems", yet the I.C.C. has here held that control of a previously affiliated system may be obtained by a non-carrier corporation without its approval. Under similar circumstances the I.C.C. entertained applications for approval of the acquisition of a carrier holding company in Weinstein—Control—Capital Transit Co. and Montgomery, 56 M.C.C. 127, and Seaboard Air Line Ry. Co. Receivership, 261 I.C.C. 689. We believe that where a non-carrier acquires control of the parent corporation of a railroad system it acquires control of the subsidiaries and consequently of "two or more carriers" so as to require I.C.C. approval. The Commission mentions no authority in support of its position but it does express its distaste for the controversies into which it would be projected if it complied with a literal reading of the statute. We believe its position unsound and that it constitutes a sur-[fol. 807] render of power which Congress regarded as important to the public interest. The attendant difficulties conjured up by the Commission are greatly exaggerated. Without undue trouble it should be able to distinguish the usual proxy contest from the acquisition of holdings by a single person or corporation of such a block of stock that it has taken control from the other stockholders.

Consideration of the purposes of the statute emphasizes the destructive aspect of the construction put forward by the Commission. Congress was concerned with three problems: the consolidation of carriers into economically sound systems in accordance with a national plan of transportation to be developed by the I.C.C.; the affiliation of carriers through common parents; and the regulatory control of non-carrier parents. Each presented questions of fundamental nationwide importance, and constituted the very heart of the constructive, progressive program for which Congress looked to the Commission, rather than something to be avoided under the pressure of less important though perhaps more immediate tasks. Further, contrary to the views which apparently guided the Commis-

sion, Congress did not seek to hide or quiet controversy. It felt that the protection of the public lay in public exposure, as well as the expertness of the Commission. In section 5(b), it set forth not only the mandate that interested parties be heard but also the authorization for public hearing and the requirement of notice to the governors of affected states for both consolidation and acquisition of control.

[fol. 808] Here the Commission would escape any responsibility as to the acquisition of the Central by Alleghany and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge & Railroad Company into the Big Four, all the while trying to keep regulatory control of Alleghany and thus preclude any consideration of the matter by the S.E.C. The undesirable consequences of the Commission's double misinterpretation of section 5 thus become all the more pointed. Alleghany's actions with respect to the New York Central and the use of its funds in that connection were transactions of a nature that Congress regarded with particular concern. Its concern was expressed in the Investment Company Act which imposed restrictions upon management of companies similar to Alleghany, and provided for regulation of these companies by the S.E.C. Its concern was also manifested in section 5 which, before the advent of the S.E.C., attempted to enable the I.C.C. to reach companies such as Alleghany. Here, the I.C.C.'s action defeats both plans for regulation.

The S.E.C. had commenced its own proceeding looking to a possible reassertion of its jurisdiction over Alleghany as an investment company. It suspended this proceeding to avoid conflict with the I.C.C and submitted to it its plea that the I.C.C., in its discretion, recognize that, regardless of its claim to jurisdiction over Alleghany as a carrier, it was primarily an investment company rather than a transportation company, and that accordingly the I.C.C. [fol. 809] not subject it to regulation under section 5(3). This is what the I.C.C. had done in other cases. See Warrior & Gulf Nav. Co. Control, 250 I.C.C. 26, *supra*. The I.C.C. denied the application of the S.E.C. apparently upon the ground that it had no power to comply with it, saying "We believe that unless Congress amends either

or both of the statutes involved herein, the results which S.E.C. desires to achieve are not within our power under the Interstate Commerce Act." Such a conclusion is without foundation. Weinstein—Control, 56 M.C.C. 127, *supra*, Arkansas & L.M. Ry. Co., 282 I.C.C. 254, Columbia Investment Co.—Control, 55 M.C.C. 375, Warrior & Gulf Nav. Co. Control, 250 I.C.C. 26, *supra; Cambria* & I.R.Co. Control, 275 I.C.C. 360; Cuyahoga Valley Ry. Co. Control, 252 I.C.C. 683; Saginaw Dock & Term. Co. Contract Carrier Application, 260 I.C.C. 657. It is not necessary now for us to pass upon the question of whether the I.C.C.'s failure to comply with the S.E.C.'s petition is reviewable as an abuse of discretion.

Our conclusion that, where no acquisition of a carrier is involved, the I.C.C. has no jurisdiction under sections 5(2) and 5(3) to provide that a non-carrier shall "be considered as a carrier" subject to the security-issuance provisions of the Interstate Commerce Act does not mean that the proceeding below must be dismissed. Alleghany sought a finding that it controlled New York Central. It was on that theory that it considered itself a necessary party to the application under its interpretation of U.S. v. Marshall Transport Co., 322 U.S. 31. Regardless of whether [fol. 810] the merger application involving the Bridge Company and the Big Four could have been presented without Alleghany's participation, the facts remain that Alleghany did participate, that it did ask for a determination of its control of New York Central as a condition to a declaration of its status as a non-carrier "considered as a carrier" and that the I.C.C. did so declare. The mere fact that Alleghany based its plea for consideration "as a carrier" on a request for approval of the merger rather than on a request for approval of acquisition of control of the New York Central is of no consequence where a finding of control of the New York Central was essential to the granting of its plea.

We do not think that the I.C.C. was without jurisdiction in the proceeding below to approve that acquisition. Indeed, if Alleghany was correct in its contention that it had acquired control of New York Central in a proxy fight preceding the stockholders' meeting of May 26, 1954, I.C.C.

consideration of the question was long overdue. Under our interpretation of the statute the I.C.C. could not have made a finding of control without approving control, yet it failed to make the prerequisite finding that the control was "consistent with the public interest" required by subdivision (b) of section 5(2). The case must go back for consideration of that question if Alleghany persists in its claim that it has acquired control of New York Central and in its desire for a declaration of its right to be "considered as a carrier".

[fol. 811] Adequacy of the Finding of Control

Even if we were to ignore the absence of a finding of consistency with the public interest, the I.C.C. made no adequate finding of control in the jurisdiction assuming order.

The findings in the determination under review on this subject are very oblique.

The provisions contained in the determination of Division Four are as follows:

> "The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Allegheny, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice-president of Alleghany holds a similar position with Central." (Sheet 3)
>
> "We recognize that the present control of the Central system has passed to Alleghany by regular cor-

CHICAGO AND VICINITY
SCALE IN MILES

ST. LOUIS AND VICINITY
SCALE IN MILES

BUFFALO AND VICINITY
SCALE IN MILES

SYRACUSE AND VICINITY
SCALE IN MILES

ALBANY AND VICINITY
SCALE IN MILES

BOSTON AND VICINITY
SCALE IN MILES

NEW YORK CITY AND VICINITY
SCALE IN MILES

TOLEDO AND VICINITY
SCALE IN MILES

DETROIT AND VICINITY
SCALE IN MILES

CINCINNATI AND VICINITY
SCALE IN MILES

CLEVELAND AND VICINITY
SCALE IN MILES

PITTSBURGH AND VICINITY
SCALE IN MILES

LEGEND

BOSTON AND ALBANY RAILROAD COMPANY ——— 1

PITTSFIELD AND NORTH ADAMS RAILROAD CORP. ——— 2

WARE RIVER RAILROAD COMPANY ——— 3

Other Lines Leased to Boston and Albany Railroad Co.:
NORTH BROOKFIELD RAILROAD COMPANY ——— 4

THE PROVIDENCE, WEBSTER AND SPRINGFIELD R.R. CO. ——— 5

THE NEW YORK CENTRAL RAILROAD COMPANY ———

OTHER RAILROADS - - - - -

NEW YORK CENTRAL SYSTEM

MAIN TRACKS

SCALE IN MILES

OFFICE OF VICE PRESIDENT

1954

opinion, no evidence supplementing the evidence outlined in the order of Division 4 in this case on the subject of control of the Central by Alleghany was introduced.

The position taken by the plaintiffs throughout has been that Alleghany was but an instrument employed by the Young-Kirby-Murchison group in the control of the New York Central and was in no sense in control. It is to be observed that the findings of neither Division 4 nor the I.C.C. meet this issue squarely.

We are forced, therefore, to the conclusion that the findings do no more than say that Alleghany, with someone else, controls New York Central. They do not even say whether the someone else, alone, has control. Does that satisfy the statute?

There is internal evidence in the statute itself that a non-carrier to have control within the meaning of that term as used in the statute must be in sole control. Section 5(2) enumerates cases, as we have said, of two kinds: one class dealing with carriers alone and the other class dealing [fol. 815] with persons who are not carriers but are in control of one or more carriers. In the first class of cases, the statute enumerates instances where two or more carriers may be in control of another carrier, but when the statute comes to deal with the case of a non-carrier in control of carriers, it enumerates only the instances where "a person which is not a carrier" acquires control. Thus, the statute, by its terms, makes no attempt to cover the case where a carrier or carriers is controlled jointly by non-carriers.

This is not to say that where a group is nominally in control of a carrier no member of the group may be subjected to the obligation of section 5. The supervisory jurisdiction over such combinations will turn on the facts of the case, but those facts must at least be made explicit in the findings of the Commission. The purpose of a finding is to explain the basis of action, not to mask it.

We thus conclude that, if the Commission's opinions contain a conclusion that Alleghany is in control of New York Central, those opinions lack sufficient findings to support that conclusion.

porate procedures even though our approval in the premises has not been sought. * * * The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility. * * *'' (Sheet 16)

[fol. 812] ''For the reasons stated we think that we are warranted in continuing Alleghany in its present status. Accordingly, we will, pursuant to section 5(3), subject Alleghany to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act. In the event that future circumstances warrant any change or modification of this finding, we retain jurisdiction to enter any order we deem necessary to protect the public interest.'' (Sheet 17)

The full Commission in its opinion said: (Sheet 9)

''The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central.''

The full Commission also said: (Sheet 11)

''* * * We affirm the findings of Division 4 that these transactions and the continued control by Central and Alleghany are within the scope of section 5(2) of the act, as amended, that the terms and conditions are just and reasonable and that the transactions and continued control will be consistent with the public interest.

''As appears from the foregoing discussion, Alleghany at the time it filed its application was in fact a person not a carrier which controlled an established system, and which was seeking authorization under

> section 5(2) for modified control of one of the system subsidiaries. * * * It is our opinion that division 4 properly applied the quoted provisions of the act. We affirm that ruling.''

It will be observed from the above that Division 4 made an unqualified statement that it recognized that control of [fol. 813] the Central had passed to Alleghany. That conclusion can stand, however, only if ultimate facts to support it are expressly found in the order of the Commission. Florida v. United States, 282 U. S. 194, 215; Yonkers v. United States, 320 U. S. 685, 692. To serve that purpose we have the statement of Division 4 that control of the functions of Central ''reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors.'' There is, however, nothing to support the statement that the nominees were actually chosen by Alleghany and some doubt is cast upon that by the fact that the preceding statement is that control reposes ''in Alleghany and its officers.'' That statement in turn is much like the statement of the full Commission to the substantial effect that Alleghany ''and its allied interests'' control New York Central.

To return to the findings of Division 4, its order discloses the fact that Alleghany's beneficial holdings of the Central stock are less than the combined individual holdings of Kirby, Young, Richardson and the Murchison group.

In a proceeding before Judge Walsh involving the application for approval of the issuance of new preferred stock, Breswick v. Briggs, 130 F. Supp. 953, *supra,* he filed an opinion, dated April 6, in which he noted that Alleghany's voting power was increased by a joint venture agreement which gave it the power at that time to vote 300,000 shares [fol. 814] of the Murchison stock. He called attention to the fact that the details of this joint venture agreement as to terminability and other matters did not appear from the opinion of Division 4.

In spite of the fact that consideration of the applications for the orders now under review was undertaken subsequent to the filing with the Commission of Judge Walsh's

[fol. 816] *The Failure to Grant Plaintiffs a Hearing*

Section 5(2)(b) provides that, in such a proceeding as the jurisdiction assuming proceedings below, the Commission "shall afford reasonable opportunity for interested parties to be heard." Plaintiffs made repeated applications for leave to be heard in the jurisdiction assuming proceedings. It was only after Judge Walsh's opinion in the case involving the preferred stock was filed with the I.C.C. that plaintiffs' application for intervention was granted, and then it was granted only in the very order which approved the merger, foreclosed the issue and constituted Alleghany a person "considered as a carrier." All of that appeared in the order of May 24, 1955 of the full Commission. Division 4 had theretofore consistently denied intervention by the plaintiffs.

The action of the Commission in permitting intervention "as of the date" of the order of May 24, 1955 was completely insufficient, except perhaps to strengthen plaintiffs' standing as one entitled to review the order.

Plaintiffs' papers on this application are full of allegations of fact bearing on the question of control which should have been before the Commission and to which the Commission made no reference in its orders.

If plaintiffs were "interested parties" and thus entitled to be heard under the statute, there can be no doubt that [fol. 817] the loss of their opportunity to present their evidence requires the setting aside of the determination. The Administrative Procedure Act, section 2(b), 5 U.S.C. §1001(b), defines "party" as follows:

> "'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

It will be recalled that plaintiffs were finally permitted to intervene in the jurisdiction assuming proceeding. Under the Administrative Procedure Act there is no such thing as permission to intervene without permission to be heard

and present evidence. Administrative Procedure Act, section 5(b), 5 U.S.C. §1004(b), reads as follows:

"*§1004. Adjudications.*

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * *.

"*(b) Procedure.*

The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

Section 7(c), 5 U.S.C. §1006(c) provides:

[fol. 818] "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Even before the passage of the Administrative Procedure Act the necessity of granting a hearing to interested parties before the I.C.C. seems to have been settled. See U. S. v. Abilene & So. Ry. Co., 265 U.S. 274; Chicago Junction Case, 264 U. S. 258, *supra*; Int. Com. Comm. v. Louis & Nash. R. R., 227 U. S. 88.

Defendants in opposition to this urge only that the matter of granting a hearing has been placed in the absolute discretion of the I.C.C. by section 5(2)(b) where it says:

"If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless

the Commission determines that a public hearing is not necessary in the public interest."

The above quoted language is in addition to and follows immediately after the mandatory direction "and shall afford reasonable opportunity for interested parties to be heard." It is thus clear that the public hearing referred to is something quite different from merely hearing the interested parties.

[fol. 819] *The Effect of the Views Above Expressed*

To paraphrase slightly the language of the Supreme Court in Mayo v. Canning Co., 309 U. S. 310, three-judge courts are admonished that, upon applications to them for preliminary injunctions the question before them is whether the showing made raises serious questions and discloses that enforcement of the act complained of, pending final hearing, would inflict irreparable damage on the plaintiffs.

We cannot believe that the Supreme Court intends that in a case such as this which presents only questions of law that have been fully argued and briefed by the parties we should limit our consideration to the degree of their seriousness. Our conviction that, more than being serious, they must be answered in favor of plaintiffs is a factor in our determination that an injunction should issue. If, however, a conclusion that the questions are serious is required, it is included in our conclusion that they must be answered in favor of the plaintiffs.

What we have said as to the damage which threatens plaintiffs supports the finding hereby made that unless the enforcement of the orders complained of is enjoined pending final hearing plaintiffs will suffer irreparable damage.

We are authorized to say for the full court that it is prepared to do all in its power to expedite a final disposition of the cause.

[fol. 820] An injunction will issue restraining, pending final judgment in this cause, the defendants Interstate Commerce Commission and Alleghany Corporation from enforcing or taking any action pursuant to (a) the orders of the I.C.C. made March 2, 1955 and May 24, 1955, in Finance

Dockets 14692 and 18656, insofar as they determine that Alleghany Corporation is in control of The New York Central Railroad, and insofar as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10) inclusive and section 20a (2) to (11) inclusive of the Interstate Commerce Act, or (b) the order of the I.C.C. made May 26, 1955, and June 22, 1955, in Finance Docket 18866 authorizing issuance of 6% convertible preferred stock. The temporary restraining order against exchange of Alleghany Corporation's 6% Convertible Preferred Stock for its Cumulative 5½% Preferred Stock Series A, issued herein on June 23, 1955, is hereby continued pending final judgment.

Settle order on notice.

Dated: July 21, 1955.

E. Dimock, United States District Judge.

I concur.

Lawrence E. Walsh, U.S.D.J.

[fol. 821] HINCKS, Circuit Judge, dissenting.

We have immediately before us only the plaintiffs' application for a preliminary injunction (1) to vacate the orders of the I.C.C. in Finance Docket Nos. 14692 and 18656 in so far as it was ordered therein "that unless and until otherwise ordered by this Commission, said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that these provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates"; and (2) restraining the enforcement of the orders of said Commission in Finance Docket No. 18866 of May 26, 1955 (by Division 4 of the Commission) and of June 22, 1955 (by the Commission). The orders in said No. 18866 approved the substance and terms of an offer by the Alleghany Corporation whereby holders of its 5½%, Series A, preferred stock may, at their option, exchange their stock for stock in a new issue of convertible 6% preferred stock.

28 U.S.C.A. 2284 (3) provides power to grant "a tem-

porary restraining order *to prevent irreparable damage*" which "shall contain a specific finding, based on evidence * * * and identified by reference thereto, that *irreparable damage* will result if the order is not granted." (Emphasis supplied). In context, the implication is plain that under the Urgent Deficiencies Act an order of preliminary injunction also must comply with this requirement. If there be any doubt as to the validity of that implication it is set [fol. 822] at rest by *Mayo* v. *Canning Co.*, 309 U.S. 310. That was a case in which, as here, a three-judge court had before it an application for a preliminary injunction. The Supreme Court held that the granting of the injunction depended on "whether the showing made raised serious questions" of law "and disclosed that the enforcement of the Act, pending final hearing, would inflict irreparable damages upon the complainants." For present purposes I will assume that the showing before us raises serious questions of law and in this dissenting opinion will discuss only the showing made for its disclosure of the companion requirement of irreparable damage.

The application was submitted at a hearing, duly noticed, held on June 28, 1955 on a record of fact which includes only such facts as were admitted in the pleadings and affidavits in support and in opposition, no oral testimony having been offered. There was no stipulation that the submission made on the application should be deemed also to be a final submission on the merits.

The plaintiffs, who hold a comparatively small amount of Alleghany common stock[1] contend, inter alia, that the orders of the Commission, in so far as brought under review in this case, are void for lack of jurisdiction in that on the applicable facts and under the applicable law (particularly 49 U.S.C.A. 5(3)) Alleghany was not a person which could lawfully "be considered as a carrier subject to" regulation under the Interstate Commerce Act. The [fol. 823] status thus challenged is one depending upon a mixed question of fact and of law. Certainly it is so, and I think not disputed, that the Commission had at least

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[1] An intervenor has computed the plaintiffs' interest as comprising only .002% of the outstanding common stock.

jurisdiction to make a determination of Alleghany's status and, on finding a carrier status to exist, to exercise the jurisdiction thus resulting. Thus, the situation is not one in which the challenged orders are void on their face. At most, the orders are voidable for error in connection with the finding of complex but essential jurisdictional fact.

For purposes of the application now before us, I make the following assumptions: (1) that when the plaintiffs' complaint comes on for hearing on the merits, this court will set aside the orders under review for error in the finding of Alleghany's carrier status and will remand the case to the I.C.C. for further consideration; (2) that eventually a valid order will be entered by that Commission and also by the S.E.C. to the effect that Alleghany is not subject to the Interstate Commerce Act and hence is not excepted by the Investment Company Act of 1940, 15 U.S.C.A. 80a-3 (c) (9), from those investment companies which are subject to that Act; and (3) that these plaintiffs have standing to bring this action.[2] Even so, in my view, for lack of sufficient showing of irreparable damage the

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[2] If plaintiffs' standing to sue is predicated upon a threatened loss of the protection afforded by the Investment Company Act, it is difficult for me to reconcile my brothers' holding on this point with *Pittsburgh & W. Va. Ry.* v. *U.S.*, 281 U.S. 479, 487. For I find nothing in that Act which suggests that it was intended, or is effective, as a protection *peculiar to common stockholders.* Nor have plaintiffs shown that *as common stockholders* they have peculiar need of protection under that Act not available to all classes of Alleghany security holders under that Act. The *Pittsburgh* plaintiffs were held to be without standing because their "financial interest does not differ from that of every investor" in the Company. Even if it were so that the interest of these plaintiffs to protection under the Investment Company Act is as efficacious for purposes of standing to sue as a "financial interest," nevertheless it would seem to me to be an interest which "does not differ from that of every investor" in Alleghany securities. In *New York Central Securities Corp.* v. *U.S.*, 54 Fed. 2, 287

[fol. 824] plaintiffs are not entitled to the preliminary injunction sought.

The only facts upon which the plaintiffs appear to rely for the preliminary injunction are as follows. Alleghany proposes immediately to complete the distribution of an issue of convertible 6% preferred stock for distribution to holders of an outstanding 5½%, Series A, preferred stock in exchange, at the latters' option, for the Series A stock held by them. The distribution of the new stock, immediately upon entry of the I.C.C. order approving the issue, was partially accomplished before halted by the temporary stay order of this court (which was continued in force pending decision on the application now before us) and will be shortly completed (in so far as holders of the outstanding preferred stock elect to make the exchange) unless the injunction sought is granted. In the record as submitted, I find no other facts pertinent to the issue of irreparable damage. All else is by way of assertion and argument as to the impact on the plaintiffs' rights, as com- [fol. 825] mon stockholders, of a distribution of the new stock if the distribution is completed before approval, or disapproval, by S.E.C.

The plaintiffs' assertion of irreparable damage, if of any substance whatever, depends on the validity of their contention that the terms of the issue are such that it will necessarily or probably be disapproved by S.E.C. if and when, by hypothesis, it shall be submitted to S.E.C. That S.E.C. under the Investment Company Act might not approve the issue is, I concede a possibility. But the possibility is too remote for present relevance unless under the facts presently before us and under the provisions of the Investment Company Act it is reasonably certain that the issue would be disapproved by S.E.C. For this result, the plaintiffs in all their oral argument and in their voluminous briefs cite neither chapter nor verse. I find nothing

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U.S. 12, the plaintiff's standing was not based on a claim of right to protection under the Investment Company Act. Reorganization cases and cases under 49 U.S.C.A. 20b involving the involuntary modification of rights of security holders are not pertinent to the standing of these plaintiffs.

in the Investment Company Act which would preclude an approval of the issue by S.E.C. For aught that appears even if the injunction is granted and eventually the proposed stock issue is submitted to the S.E.C., that tribunal after full exercise of its investigative and regulative powers may approve the issue. If this shall prove to be the end result, the plaintiffs will have gained only such satisfaction as they may take from the fact that action which they dislike has the sanction of two tribunals instead of one. Deprivation of such emotional satisfaction is no more irreparable damage than the "sentimental" loss which was held to be insufficient basis for an injunction in *Moffat Tunnel League* v. *U.S.*, 289 U.S. 113.

[fol. 826] In this connection, I do not overlook the conclusory assertion in the complaint, wholly unsupported by proof, that officers of Alleghany stand to gain, directly or indirectly, from the proposed issue of preferred stock. The possibility of gain has no connotations necessarily sinister. The issue has been approved by large majorities both of the preferred stock and the common stock. Presumably all who voted to approve expected gain. The achievement of that objective by others does not import damage to the plaintiffs. If, however, the assertion was meant to insinuate conduct by directors violative of fiduciary responsibility, it suggests that this litigation may be motivated by a decision to embarrass management by fomenting investigations by S.E.C., or that its true objective is by S.E.C. investigations to obtain ammunition for a stockholders suit. Certainly loss of opportunity to give vent to malice is not the equivalent of irreparable damage. And it seems equally clear that plaintiffs are not entitled to an injunction merely because they would like to supplement the discovery provisions of the Federal Rules by S.E.C. investigations. The mere frustration of such a hope is not of itself "irreparable damage." In this connection, it may be noted that by its report in Finance Docket No. 18866, the I.C.C. showed that it was fully apprised of the directors' stock interests in Alleghany.

My brothers point to the declared policy of the Investment Company Act to "mitigate * * * and to eliminate the conditions" which adversely affect "the interest of in-

[fol. 827] vestors" * * * "when investment companies are operated or managed * * * in the interest of directors, officers, etc." They seem to hold that, even absent any showing of harm to these plaintiffs flowing from the assumption of jurisdiction by I.C.C. and absent any showing that the assumption of jurisdiction by S.E.C. will result in action more advantageous to their interest, they are entitled to the beneficent protection which the Investment Company Act provides against the improvidence or skulduggery of their own management. The possibility of deprivation of that protection, my brothers seem to feel, is proof enough without more to warrant the injunction.

I cannot agree. It is true that in their complaint plaintiffs allege that Alleghany's affairs have been conducted primarily in the interest of those in control. But for this we have only the plaintiffs' bare assertion: no evidence whatever has ever been offered to support that allegation. My brothers make no finding on the point. Thus, for aught that appears this case does not even come within the policy declaration of the Investment Company Act which my brothers are assuming indirectly to enforce.

But that aside, I find nothing in that Act which gives investors in investment companies a right to enforce its policies. Section 42 of the Act, 15 U.S.C.A. 80a-41(a), specifies that "The Commission shall permit any person to file with it a statement in writing" as to the subject matter of possible investigations but leaves it to the Commission in its discretion to "make such investigations as it [fol. 828] deems necessary to determine whether any person has violated or is about to violate any provisions" of the Act. And by Section 80a 41(e) S.E.C. is given power "in its discretion" to bring actions to enjoin violations in a district court. In the light of these carefully limited provisions I think it wholly inadmissible to interpret the Act as according to any private party, whether an investor or a potential investor, a right to enforce the policy of the Act as he conceives it to be. Nor do I think that this court, in the exercise of jurisdiction under the Urgent Deficiencies Act, has carte blanche to enforce its conception of the policy of the Investment Company Act. I conclude that at most these plaintiffs may derive an incidental benefit under the

Investment Company Act; that the deprivation of such a benefit, which the plaintiffs concede has no measurable pecuniary value, is not "irreparable damage."

Further, my brothers seem to feel that the plaintiffs are entitled to the injunction sought because without it the proposed issue will be accomplished and, at least as a practical matter, the immediate cause of controversary will become moot. Granted that they are right as to the postulated result, I submit that the conclusion based thereon is faulty. The extraordinary and drastic remedy of injunction is not the product of a slot machine into which any disgruntled stockholder can insert a nickel. It does not issue in every case as of right merely to preserve the *status quo* pending final determination of the merits. Nor [fol. 829] is its function merely to support hopes or malice. It issues only at the discretion of the chancellor on a showing of irreparable injury. And that injury must be more than a vague statement of a remote and contingently potential harm. This principle was recognized—although, to be sure, in quite a different setting—in *New Jersey* v. *Sargent*, 269 U.S. 328; *Arizona* v. *California*, 283 U.S. 423; *Massachusetts* v. *Melon*, 262 U.S. 447; and *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249. I am not so much concerned by the *possibility* that the proposed stock issue may in the long-range future turn out to be disadvantageous to the common stock. After all that is essentially a question of business judgment primarily for management which in the normal course minority stockholders must accept. Here management has made its decision and the decision has been affirmed by a large majority of the voting stocks and approved by the I.C.C. To be sure, Alleghany may eventually be found to be subject to the Investment Company Act, with a result which may, or may not, be more advantageous to common stockholders. The loss of this remote and contingent advantage the law does not, I think, classify as irreparable damage.

Consequently, in the situation here, I am more concerned with the hardship that the injunction will impose on others. From the affidavit of Alleghany's secretary-treasurer received in opposition to the injunction sought, I find that the effect of the injunction will be seriously to em-

barrass Alleghany (a) in obtaining the renewal of various [fol. 830] bank loans aggregating $8,200,000 which will mature on or about September 15, 1955 and (b) in its negotiations for refunding these loans on a more favorable basis. As a result it may become necessary to pay off the loans and for that purpose to liquidate part of its portfolio. (In this connection, I think it may be inferred that the most favorable terms cannot be obtained by forced liquidation to meet a fixed deadline and that such a liquidation, whatever the terms, is likely to interfere with investment policies). I find further that it will be necessary, if Alleghany is to maintain its policy of parity of representation between outstanding preferred stock issues and the common stock on its Board of Directors, for it either to pay in full the large arrearages of dividends on the 4700 shares of Series A preferred stock which declined to accept the offer of exchange for the new 6% issue, thereby stripping that small block of the right to elect two directors, or to redeem that block of stock. Notice to redeem the stock cannot be given as long as an injunction precludes the distribution of the 400,000 shares of the new preferred still awaiting exchange, and even then under the Alleghany charter redemption can be accomplished only on a stated quarterly dividend date. If this course is precluded by an injunction, to maintain its policy of class representation Alleghany will be required to pay off the arrearages in dividends on this block of stock,—a course which is far more burdensome, tax-wise, to the stockholders involved than redemption which would classify as a captital transaction. [fol. 831] Further, I find from the affidavit of the intervenor Blatt, that at least 100,000 shares of the new preferred stock were traded on a "when issued" basis between May 26, 1955 and June 22, first in the over-the-counter market and commencing on June 8, 1955 on the New York Stock Exchange; and that trading therein proceeded in a substantial volume on an actual basis on June 24 when further trading on the New York Stock Exchange was suspended because of the stay order herein. From this it is fairly inferable that trading in the stock will not be resumed on the Stock Exchange if the stay order ripens into a preliminary injunction. The further inference is

required that during the pendency of an injunction the marketability of the new stock which was issued, and consequently its value, will be substantially impaired and its acceptability as collateral will be largely destroyed. It is further inferable that an injunction which precludes stockholders who deposited their Series A stock for exchange from receiving the new stock will intensify the confusion and the hardship caused them by the stay order. Their rights, during the pendency of an injunction, to a return of the deposited stock and the obligation to return it involve complicated legal questions which may well require protracted litigation for resolution.

These findings I have tested against the affidavits of Mr. Phillips, one of the plaintiffs who has appeared throughout, *pro se*. His main affidavit shows that he is indeed a man of experience in the field of finance: that for a time prior to November 1941 he was "Executive Assistant" to the [fol. 832] Chairman of Alleghany's Board. He states that "In July 1953 I became Financial Consultant to Alleghany Corporation and the C. & O. I was the first expert to be consulted by Mr. Young and Alleghany Corporation in connection with the contest for control of New York Central by the Alleghany-Young-Kirby nominees. Thereafter I was a member of the strategy board that successfully developed and executed the subsequent proxy campaign." But notwithstanding this background, neither by his main affidavit nor his reply affidavit does he show facts—as distinguished from self-serving conclusions—which controvert my findings as above stated. As to the damage to Alleghany which would result from an injunction, he bases his conclusion vaguely on his alleged knowledge of Alleghany's affairs as an insider. But he does not directly assert status as an insider subsequent to July 1953. He also professes to have "general knowledge of I.C.C., S.E.C., and banking practice." On this basis he offers as proof only his assertion of the very proposition which it was for him to prove, viz; "there is no substantial difficulty which will face Alleghany in the renewal of its $8,200,000 loan, due on Sept. 15, 1955." He says that Alleghany's annual report for 1954 showed "marketable securities on hand with an indicated market quotation of $67,944,633. He did

not explain how these securities can be liquidated without loss or interference with investment policies before a deadline two months distant. And as to the impact of an [fol. 833] injunction on Alleghany's negotiations to refund its bank loans, he says nothing. As to the impact of an injunction on the composition of Alleghany's board he seems to think that there is no limit to the extent to which this court can officiate as Alleghany's Board, saying: "It is obvious that this Court of Equity has full power to deal with the situation and to indicate that all holders of the Series A and the 6% Preferred Stock, together, should be entitled to elect two directors." As to this, he assumes more knowledge of the powers of a chancellor that I, at least, possess.

As to the injurious effect of an injunction on Series A stockholders, Mr. Phillips says only that some at least may have deposited their stock as early as February 10, 1955 and thereby voluntarily consented that it should be "frozen" until the closing date of the exchange offer. He does not exclude the possibility that such stockholders might normally be expected to withhold deposit until the closing date was near at hand and deposit then in reliance on the terms of the exchange offer whereby they would receive marketable stock on a fixed date in the near future. He argues that because for a limited period accepting stockholders voluntarily assented to a freeze until a fixed date, it must follow that they will not be injured by an involuntary freeze continued into the indefinite future while this litigation winds it weary way through the courts and the two Commissions. I think the argument specious: without [fol. 834] relying on the cries of anguish from frozen stockholders which were expressed informally at the hearing on this application, I think my findings of injury to them as above stated are clearly required as the only sensible inferences from proved facts.

The proved hardship to Alleghany and preferred stockholders is perhaps irrelevant if, as I think, plaintiffs have made no showing at all of irreparable damage. If, however, an appraisal of the record affords some support for a possible finding of such damage to them, I think the impact of injunction on Alleghany and the intervenors is a

solid factor which should be given appropriate weight in the formulation of our discretion.

Lastly, I think it not permissible on the submission of a preliminary application, which raises the issue of irreparable damage, to proceed, at least in the setting of this case, to a determination of the underlying merits. I freely concede that for its impact on the validity of the orders under review the exegesis of my brothers demonstrates that the showing made is enough to satisfy the first requirement of the quotation in an early page in this opinion from the *Mayo* opinion, viz., the existence of "serious questions" of law. But their exegesis, even if sound, goes no further than to demonstrate that the plaintiffs have solid ground for attacking the underlying jurisdiction: it does not reach the issue of irreparable damage. Before it can be reflected in a final decree, the defendants and intervenors are entitled as of right to a trial on the merits. At the trial the claim of irreparable damage will be in issue and may [fols. 835-836] be expected to provoke a record of fact not now before us, on the basis of which the right to a permanent injunction must be determined. Even if, after trial, the court feels constrained to annul the orders under review for error in the proceedings before the Commission or in the Commission's jurisdictional findings, it may nevertheless decide that on the record as then made for lack of irreparable damage to the plaintiffs no injunction should issue to restrain Alleghany from completing the stock distribution. Such a disposition would leave Alleghany free to proceed at its own risk in confidence, if so advised, that on appeal the orders annulled would be reinstated. Surely the preliminary injunction now sought should not be granted merely because it is presently thought that at a later stage this court will annul the orders under review.

My conclusion is based not at all upon Alleghany's offer made in open court at the hearing to post a bond in a principal sum exceeding many times the value of the plaintiffs' stock to indemnify them from any loss resulting from the accomplishment of the proposed stock distribution. Nor am I affected by the plaintiffs' indifference to that offer.

Since we are not now concerned with an application for a supersedeas bond, I view the offer as irrelevant.

I would terminate the stay order forthwith and deny the application for a preliminary injunction.

[fol. 837] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 101-114

BRESWICK & CO. AND RANDOLPH PHILLIPS, as Common Stockholders of Alleghany Corporation, Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, Alleghany Corporation, The New York Central Railroad Company, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership doing business as Gruss & Co., and Samuel A. Mehlman, Defendants

OPINION DENYING REQUEST FOR STAY—July 26, 1955

DIMOCK, D. J.

Defendants move for a suspension of an injunction pending appeal to the Supreme Court, presumably under authority of Rule 62(c) F.R.C.P.

The action is one to enjoin permanently the enforcement of orders of the Interstate Commerce Commission by which the Commission has, in effect, assumed jurisdiction, to the exclusion of the Securities and Exchange Commission, over the security issuing activities of Alleghany Corporation and by which it has authorized a particular exchange of 6% preferred stock for 5½% preferred stock.

Plaintiffs contend that the I.C.C. has no power to assume such jurisdiction because Alleghany does not have "control of a carrier" within the meaning of section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), that the

I.C.C.'s finding of such control was insufficient and that the I.C.C. committed substantial error in refusing plain-
[fol. 838] tiffs a hearing on the question.

On a motion for a preliminary injunction, a three-judge court has held that the I.C.C.'s findings were insufficient and that it committed substantial error in refusing plaintiffs a hearing. The court has accordingly enjoined, pending the final hearing, the enforcement of the I.C.C.'s assumption of jurisdiction and the consummation of the exchange. The injunction against the consummation of the exchange continued in force a restraining order to the same effect.

Alleghany, on February 10, 1955, mailed to the holders of its 5½% preferred stock an offer for its exchange for a new 6% preferred stock.

On February 15, 1955, plaintiff Breswick & Co. sought from the Commission leave to intervene in the proceeding which resulted in the jurisdiction assuming order. Alleghany opposed and leave was originally denied.

The preferred stock exchange offer required all who wished to accept it to deposit their stock certificates. It was conditional upon approval by the I.C.C. and its acceptance by 100,000 shares or such lesser number as the corporation might deem satisfactory to it. On the expiration of five business days after the issuance of the I.C.C. order the stock could not be withdrawn. There was no provision postponing the consummation of the exchange in the event of court review of the I.C.C. approval.

A proceeding was brought before the I.C.C. for the approval of the exchange and plaintiffs sought leave to intervene. Like the application for leave to intervene in the other proceeding, this was opposed by Alleghany and originally denied by the I.C.C. After a decision by Judge Walsh in another case, however, intervention in the preferred stock proceeding was permitted by the I.C.C. Plaintiffs filed a brief taking the position that approval should
[fol. 839] not be given and closing with the request in substance that, if the I.C.C. should be disposed to grant approval, its order should be stayed long enough to permit plaintiffs to begin court proceedings before the exchange should be consummated.

In spite of this request, the full Commission issued an

order approving the exchange dated June 22, 1955. Alleghany learned of this about noon on June 23, 1955 and, although plaintiffs had already noticed in this case a motion for a preliminary injunction against assumption of jurisdiction by the I.C.C., immediately began issuing the new preferred stock to those who had accepted the exchange offer. Plaintiffs learned of the I.C.C. approval in the middle of the afternoon and, at 5:55 p.m., obtained a temporary restraining order against further exchange and against transfer of the new stock. By that time, however, more than half of the new stock had been issued. The restraining order has been continued as a preliminary injunction pending final hearing.

Alleghany now seeks to avoid the hardships to which this state of affairs subjects it and asks that the injunction be suspended pending appeal. The result of suspending the injunction, so far as the exchange of preferred stock is concerned, would be in substance a modification of the court's decision. The exchange would take place and plaintiffs would be left to their remedy at law, if any.

If Alleghany were the only person subjected to hardships the question would be easy. All that Alleghany offers plaintiffs is money indemnity and the basis of the award of the injunction was that money indemnity would be inadequate. Moreover, Alleghany finds itself subject to hardships only because of its original omission to take into account the possibility of court review and its later precipitate action under the I.C.C.'s order while the question of the I.C.C.'s jurisdiction was *sub judice*.

[fols. 840-841] What makes the question perplexing is the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return. Alleghany, pleading the cause of these innocent people as a reason why plaintiffs should be deprived of what I conceive to be their legal rights, seems to me an invader who drives before his soldiers a protecting barrage of civilians.

I vote to deny the application for a suspension of the injunction pending appeal.

Dated: July 26, 1955

D. J. Dimock, United States District Judge.

[fol. 842] DISSENTING OPINION ON STAY—July 26, 1955

HINCKS, C. J.

I think the stay sought should be granted. The hardship both on Alleghany and its stockholders is plain. This was described in my dissenting opinion addressed to the plaintiffs' application for the preliminary injunction. The injunction granted at most has urgency only for its effect in restraining the completion of Alleghany's exchange offer. This feature of the injunction has its chief impact on innocent stockholders. At the hearing, Alleghany made representations, which to me were highly credible, to the effect that the utmost possible damage to the plaintiffs from the dilution of their stock which might result from the exchange offer aggregated $1,015. I think a bond of $2,500 would adequately protect the plaintiffs legitimate pecuniary interest. The injunction, insofar as it is addressed [fols. 843-844] to the orders of the Interstate Commerce Commission, is not at all needed to protect plaintiffs' pecuniary interest. Nor will the plaintiffs be at all injured if it goes into effect not until after the order of injunction is affirmed on appeal. Its suspension pending appeal will save the established practice of the Interstate Commerce Commission from disturbance pending a final decision as to its validity. The suspension is also desirable to prevent the hardship to Alleghany mentioned in my dissenting opinion and also to enable the New York Central Railroad Company, which was a party to the proceedings before the Commission and is a party in this case, to proceed with arrangements for its own internal reorganization in which these plaintiffs under no theory have a legitimate interest.

July 26, 1955.

Carroll J. Hincks, C. J.

[fol. 845] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES,

No.—OCTOBER TERM, 1954.

BRESWICK & CO. AND RANDOLPH PHILLIPS, AS COMMON Stockholders of Alleghany Corporation,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, Alleghany Corporation, The New York Central Railroad Company; Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a Copartnership, Doing Business as Gruss & Co., and Samuel A. Mehlman, Defendants

ON APPLICATION FOR A STAY OF INJUNCTION AND SUPERSEDEAS PENDING APPEAL

OPINION OF MR. JUSTICE HARLAN PARTIALLY GRANTING

ALLEGHANY'S APPLICATION FOR SUPERSEDEAS—August 3, 1955

MR. JUSTICE HARLAN, Circuit Justice.

I have before me an application by the defendant Alleghany Corporation for an order (a) staying, pending an appeal to this Court under 28 U. S. C. § 1253, a preliminary injunction order of a three-judge court of the United States District Court for the Southern District of New York made on July 26, 1955, (b) granting supersedeas upon Alleghany posting an appropriate and sufficient bond, and (c) setting the appeal for argument on the first argument day of this Court in October.

At the oral argument representations were made on behalf of the Attorney General and the Interstate Com- [fol. 846] merce Commission as to their support of the application for the requested relief. The Securities and Exchange Commission, which was allowed to be heard orally and to file a brief as *amicus*, took a neutral position in the controversy, at the same time disclaiming any in-

tention to acquiesce in the jurisdiction of the Interstate Commerce Commission in the premises.

The injunction sought to be stayed enjoyed the defendants Interstate Commerce Commission and Alleghany Corporation, pending final judgment, "from enforcing or taking any action pursuant to (a) the orders of the Interstate Commerce Commission made March 2, 1955, and May 24, 1955, in Finance Dockets 14692 and 18656, insofar as they determine that Alleghany Corporation is in control of the New York Central Railroad and insofar as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of § 20 (1) to (10) inclusive and § 20a(2) to (11) inclusive of the Interstate Commerce Act, or (b) the orders of the Interstate Commerce Commission made May 26, 1955, and June 22, 1955, in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock." The order also enjoined Alleghany, its transfer agents and others acting for it "from issuing, distributing or transferring or converting into Common Stock any of the 6% Convertible Preferred Stock of Alleghany Corporation, which was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause." The injunction was conditioned upon the plaintiffs posting a $1,000 cost and damage bond in favor of Alleghany.

In granting the preliminary injunction the District Court was divided, District Judges Dimock and Walsh voting its issuance. On July 26, Judges Hincks and Dimock (Judge its issuance. On July 26, Judge Hincks and Dimock (Judge [fol. 847] Walsh being abroad) again divided on Alleghany's motion for a suspension of the injunction pending appeal, and accordingly suspension was denied by an order of the two Judges on the same day. There followed the present application which was argued at length before me in New York City on August 1.

The plaintiffs concede that I have power to grant the stay and supersedeas sought. See Revised Rules of the United States Supreme Court, Rules 18 and 51; cf. F. R. C. P. 62 (g). But they urge that I should deny the application in the exercise of sound discretion. They especially

urge that a stay of the injunction, insofar as it relates to the preferred stock, will render moot the appeal from that part of the injunction, and that I, as a single Justice, should not take action having that result. But I do not see how I can properly escape the responsibility of weighing the competing equities and granting a stay if I find that on balance the scales are strongly tipped in that direction. Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue. *Yakus* v. *United States*, 321 U. S. 414, 440 (1943). And the same considerations obtain where the issue is whether an injunction should be lifted or stayed. I think the matter is cast in no different light when one consequence of staying an injunction pending appeal may be to render the appeal moot in whole or in part. Cf. *Federal Trade Commission* v. *Thomsen-King*, 106 F. 2d 517, 519 (1940). I am informed by the Clerk of this Court that such stays have in the past been granted by single Justices in unusual circumstances. It goes without saying that a single Justice's stay powers in a case such as this should be exercised most sparingly, both in fairness to the prevailing parties below and out of deference to the Court. [fol. 848] A single Justice may also be expected to give due regard to a lower court's denial of a stay.*

I therefore turn to the competing equities in the situation before me. In granting the preliminary injunction the majority of the District Court found in its opinion that the plaintiffs, absent an injunction, might suffer irreparable damage in two respects: (1) possible dilution of the

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*In *United States ex rel. Knauff* v. *McGrath*, October Term, 1949, printed at 96 Cong. Rec. A 3751, the late Mr. Justice Jackson said: "As Circuit Justice for the Second Circuit, it is my *almost* invariable practice to refuse stays which the Court of Appeals or its judges have denied. This is because they are closer to the facts, have heard the merits fully argued, and because I have confidence that they would grant stays in worthy cases." (Emphasis supplied.) In the particular case before him Mr. Justic Jackson granted a stay.

value of their common stock interest in Alleghany, in the event that the preferred stockholders should exercise their conversion rights under the new issue; and (2) possible loss of interim protection under the Investment Company Act if it were ultimately held that regulation of Alleghany's affairs is subject to the provisions of that Act rather than to those of the Interstate Commerce Act. In the temporary injunction order it is also found that the denial of an injunction "would deprive plaintiffs of findings required by Section 5 (2) of the Interstate Commerce Act, that the orders reviewed are consistent with the public interest and otherwise comply with the provision of said Sections 5 (2) and 5 (3)." If this be damage, however, its prevention is not covered by the injunction now in force, and consequently such possible damage cannot be taken into consideration in deciding whether the injunction should be stayed.

I am not concerned here with the question whether the other findings of irreparable damage are sufficient to support the injunction, but rather with the question of whether the plaintiffs can be adequately indemnified against such damage pending appeal. I see no reason why this cannot [fol. 849] be accomplished by requiring Alleghany to furnish an appropriate bond. As I see it, the outside limit on the possible loss to the plaintiffs, should they ultimately succeed in their contentions, is the highest value that their stock might have attained, had Alleghany been subject to the Investment Company Act's requirements, and had no dilution of the plaintiff's equity by reason of "conversion" taken place, during the pendency of this litigation. I think a bond can be devised to cover such contingencies adequately, even though in the nature of things no precise estimate can be made of the possible future value of plaintiff's stock.

I do not think, however, that the mere conclusion that the plaintiffs' interest is bondable would justify me in overturning the District Court's decision. Consequently I turn to the elements of prejudice to the defendants flowing from the continuance of the injunction.

As to the part of the injunction which relates to Alleghany's control of the Central and its status as a non-

carrier "considered as a carrier": while it could be argued that the issuance of this order was improvident in the absence of a showing of threatened action by the Interstate Commerce Commission, nevertheless neither Alleghany nor any of the other interested parties has undertaken to show specifically how they will be prejudiced by continuance of this aspect of the injunction. In these circumstances I am disposed to let this part of the injunction stand.

As to the part of the injunction relating to the new preferred stock issue, the situation is different. The competing equities urged in support of a stay have been set forth in Judge Hincks' dissenting opinions below. In summary, they are that continuance of the injunction will (1) prejudice the position of Alleghany in renewing or refunding some $8,000,000 of bank debt maturing in September 1955; (2) make it impossible for Alleghany to main- [fol. 850] tain its policy of equal director representation of the common and preferred stock, except on disadvantageous terms; (3) seriously prejudice Alleghany's preferred stockholders who have surrendered their own preferred stock and are either prevented from receiving the new preferred stock, or to the extent that they have received such stock, are left with a frozen asset; and (4) prevent the defendant New York Central Railroad Company from proceeding with arrangements respecting its own internal reorganization.

In weighing these equitable considerations against the plaintiffs' contentions, I am most impressed with the prejudice which continuance of this injunction will work on the preferred stockholders. Alleghany had about 136,000 shares of Class A preferred stock outstanding, all but about 24,000 of which were held by the general public. Approximately 130,000 shares of this stock have been delivered to Alleghany for exchange. 900,000 shares of the new preferred stock were issued in exchange for 90,000 of these shares before any action by the District Court. The temporary injunction bans the further transfer of those 900,000 shares by Alleghany or its agents, and also forbids the issuance of additional shares. Thus the 900,000 shares are not readily marketable or acceptable as collateral, and

the holders of some 40,000 shares of the old stock are not able to receive from Alleghany the 400,000 shares of new stock to which they are entitled under the exchange offer. The value of the old preferred stock on May 1, even before the exchange was approved by the I. C. C., was in the neighborhood of $40,000,000, which is many times that of the plaintiffs' shares, presently valued at about $7,000. The plaintiffs own but 700 shares of common stock out of approximately 4,600,000 shares outstanding, of which about 4,000,000 shares are publicly held; and 97½% of the common stock voting at the stockholders' meeting at which the preferred stock plan was approved (representing ap- [fol. 851] proximately 72% of the outstanding common) voted in favor of the plan.

While I would hesitate to stay the injunction on the basis of the equities asserted solely on Alleghany's behalf, the position of the preferred stockholder does, in my opinion, call for some measure of relief. I am not unmindful of the plaintiffs' contention that Alleghany proceeded with the preferred stock plan after notice of the plaintiffs' objection and proposed injunction suit, but I do not think this can be laid at the door of the preferred stockholders so as to disentitle them to consideration of their predicament.

But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might render moot the whole appeal from that part of the injunction, I would be disposed to grant that relief. But it must be borne in mind that the considerations governing the situation now before me as a single Justice are quite different from those which would be involved in determining the propriety of the issuance of the injunction in the first place. Under the circumstances, I think the fair thing to do is to stay the injunction insofar as it relates to the 900,000 shares of new preferred stock which already have been issued, and let the injunction stand as regards the 400,000 unissued shares. This course may render the appeal moot to the extent that it relates to the order banning further transfer of these 900,000 shares, but it shall relieve the holders of these shares from their current situation; and it may be that these shares have already become a valid is-

sue, even if it is assumed, as plaintiffs contend, that proper approval was not secured. See *A. C. Frost & Co.*, v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941). The effect of this course may be said to discriminate against preferred shareholders who have tendered their old stock but have not yet received new stock in exchange. And I recognize that [fol. 852] whether a tendering preferred shareholder has or has not received his new preferred stock may be largely a matter of accident. Nevertheless, the equities in his favor do not seem quite so strong as those in favor of the other preferred stockholders, and appear to me to be pretty well offset by the consideration that to grant a stay of the injunction on the whole issue of new stock would probably render entirely moot an appeal from that part of the injunction.

I find no substance to the plaintiffs' contention that Alleghany's present application is premature. I am disposed to think that the signature of one judge to the injunction order, which conformed to the majority opinion of the three-judge court as to the scope of the injunction, satisfied the requirements of 28 U. S. C. § 2284. However, if I am wrong, then consummation of the preferred stock plan would not violate a valid injunction order and the stay which I am granting would be of no account. Nor do I think that the two-judge order denying supersedeas runs afoul of 28 U. S. C. § 2284 so as to be an insufficient foundation for the present application. Moreover, Rule 18 (2) of the Revised Rules of this Court permits the entertaining of such an application as this without any prior application below. And the urgency of the present situation would justify relaxation of the normal procedure, if need be.

The plaintiffs' contention as to the alleged unfairness of the preferred stock plan is not open here. *Pittsburgh & West Va. R. Co.* v. *United States*, 281 U. S. 479 (1930).

I shall sign an order staying, pending appeal to this Court, the interlocutory injunction granted below, insofar as the injunction order relates to the 900,000 shares of preferred stock already issued. In all other respects the application for a stay is denied. The stay which I have granted is conditioned upon the defendant Alleghany

(a) filing, simultaneously with the entry of the order to be made herein, a surety bond running to the plaintiffs [fol. 853] in the amount of $14,000, containing the usual conditions, and in addition indemnifying the plaintiffs against all loss and damage arising out of (i) dilution of the value of their common stock by reason of the conversion of any of the new preferred stock and (ii) the absence of Investment Company Act protection, pending final determination of the issues involved in this litigation; and (b) filing its notice of appeal to this Court from the order below, within 3 days from the date of this memorandum.

I have fixed the amount of the bond at approximately double the present market value of the plaintiffs' common stock, which seems to me a generous allowance for their greatest possible exposure to loss pending appeal.

Alleghany also asks that I set the appeal for argument on the opening argument day of the new Term. This I have no power to do, and Alleghany must address its application to the full Court. See Rule 43 (4) of the Revised Rules of this Court.

I hope that the parties will be able to agree as to the form and sufficiency of the bond and order. If not, both may be submitted to me for settlement and approval at my summer home at Weston, Connecticut, on or before August 9.

[fol. 854] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & CO., AND RANDOLPH PHILLIPS, as Common Stockholders of Alleghany Corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE Commission, Alleghany Corporation, The New York Central Railroad Company, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., and Samuel A. Mehlman, Defendants

OPINION—Nov. 18, 1955

Before: FRANK, Circuit Judge, and DIMOCK and WALSH, District Judges.

This is an action to enjoin, or vacate and set aside as void, orders of the Interstate Commerce Commission.

Rosston, Hort & Brussel (George Brussel, Jr. and Eugene G. King, of counsel) for Breswick.

Randolph Phillips, pro se.

Herbert Brownell, Jr., Attorney General of the United States (Paul W. Williams, United States Attorney for the Southern District of New York, of counsel) for United States.

Leo H. Pou, Washington, D. C., for Interstate Commerce Commission.

White & Case and Wheeler & Wheeler (Edward K. Wheeler, David Hartfield, Jr., Robert G. Seaks, Andrew O. Miller and Morton Mostkin, of counsel) for Alleghany Corporation.

Proskauer Rose Goetz & Mendelsohn, for intervening defendants, Joseph S, Gruss, et al.

Harold H. McLean and Edward K. Wheeler, for New York Central Railroad Company.

Samuel A. Mehlman, pro se.

[fols. 855-856] PER CURIAM:

Since the filing of our previous opinion dealing with the preliminary injunction,[1] and of our order granting such an injunction, we have held a hearing on the merits, at which we received evidence, heard extensive arguments, and received elaborate briefs, concerning final relief.[1a] As a result, we adhere, for the most part, to what was said in the previous majority opinion.

1. However, we now think the following considerations are pivotal: Defendants' chief contention runs thus: (1) Under the doctrine of United States v. Marshall Transport Co., 322 U.S. 31, Alleghany was a necessary party to the merger proceedings. (2) The Commission, by its order in those merger proceedings, held it in the public interest that, by the merger, Alleghany should acquire control of the Bridge Company. (3) That order, authorizing Alleghany to acquire that control, made Alleghany, pursuant to Section 5(3), a carrier for purposes of Section 20(a).

We think item (1) of this argument untenable. For, assuming, arguendo, that, before the merger, Alleghany already controlled New York Central,[2] we think the merger of Bridge Company and Big Four did not involve any further acquisition by Alleghany, a non-carrier. We rest this conclusion on an analysis of 49 U.S.C. 5(2)(a)(i). For convenience, we print, as follows, its provisions in separate sub-paragraphs, assigning each sub-paragraph a Roman number:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(I) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one

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[1] The majority opinion is reported at 134 F. Supp. 132. By inadvertence, Judge Hincks' dissenting opinion has not yet been published.

[1a] Chief Judge Clark duly designated Judge Frank in place of Judge Hincks who was unable to sit because of illness.

[2] As to which, see point II of the Appendix to this opinion.

corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or [fols. 857-858] "(II) for any carrier, or two or more carriers, jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or

"(III) for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or

"(IV) for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or

"(V) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . ."[3]

Subparagraphs (I), (II), and (III) deal solely with carriers. Subparagraph (I) deals with a merger, (II) with a purchase, lease or contract to operate, and (III) with a case where a carrier or carriers seeks to "acquire control." In contrast, subparagraph (IV) and (V) deal solely with situations which involve "a person which is not a carrier"; as to such a person, those two sub-paragraphs significantly say nothing whatever about a merger, but relate exclusively to cases in which a non-carrier seeks to "acquire control."

A merger of carriers may involve an acquisition of control by a non-carrier, where, through the merger, the non-carrier acquires control (direct or indirect) of a carrier or carrier property which the non-carrier had previously not controlled; United States v. Marshall Transport Co., 322 U.S. 31. But where, as in the instant case, the non-carrier (Alleghany) is (according to our assumption, arguendo) already in indirect control of a carrier (Bridge Company), and the merger still leaves the non-carrier in indirect control of such property, no acquisition by the non-

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[3] Section 5(2)(a)(ii) reads: ". . . or for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

carrier results from the merger.[4] This seems to us the plain, clear and obvious interpretation of the statute. Therefore, United States v. Marshall Transport Company, [fols. 859-860] supra, is inapposite. We think the Commission had no power to make any order, in the merger proceedings, which authorized the Alleghany Corporation to "acquire control" of Bridge. Accordingly, so much of the order as purported to do so was a legal nullity.

Defendants argue that this interpretation of Section 5(2)(a)(i) is erroneous because the Commission's decisions disclose a contrary well-settled administrative interpretation of that section. We find no such well-settled administrative interpretation. See point I of the Appendix to this opinion, where we discuss the pertinent Commission decisions; it shows that the Commission's interpretations have been not at all consistent and uniform. We assume, arguendo, that, were they clear, uniform and consistent, we would be obliged to abide by them (a proposition by no means certain when the administrative interpretation is patently irrational).[5] But when administrative interpretations lack consistency and uniformity, the courts give them little or no weight.[6]

Alleghany did not seek, nor did the Commission enter,

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[4] The merger proceedings also involved approval of a lease of Bridge Company's property to New York Central; again, that transaction involved no acquisition of control by Alleghany of property which it had not previously controlled.

[5] See the opinion of Judge Learned Hand in Kandelin v. Social Security Board, 136 F. (2d) 327, 328 (C.A. 2).

[6] United States v. Missouri Pacific R. Co., 278 U.S. 269, 280; Burnet v. Chicago Portrait Co., 285 U.S. 1, 16; Alexander v. Cosden Pipe Line Co., 290 U.S. 484, 498; Estate of Sanford v. Commissioner, 308 U.S. 39, 49-54; American Surety Co., of New York v. Bethlehem National Bank, 314 U.S. 314, 319; United States v. Healey, 160 U.S. 136, 145; Merritt v. Cameron, 137 U.S. 542, 551-552; Isbrandtsen Co. v. United States, 96 F. Supp. 883, 891 note 23. See also annotations in 73 L. Ed. 345-349, and 84 L. Ed. 47-50.

any order approving Alleghany's control of New York Central as in the public interest. Consequently, assuming, arguendo, that Alleghany had acquired control of Central, there is no Commission order, under Section 5(2) which brings Alleghany within the Commission's jurisdiction under Section 5(3).

[fols. 861-862] 2. Defendants contend, in the alternative, that Alleghany still has the status of a carrier by virtue of the ICC's order of June 5, 1945. We rejected that contention in our previous opinion, and see no reason for abandoning that rejection. Alleghany points to 49 U.S.C. Section 15(2) which provides that "all" orders of the ICC "shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission. . . ." But we think Section 15(2) must be read in connection with Section 15(1) which relates solely to rate orders or the like. A single sentence in the opinion of The Chicago Junction case, 264 U.S. 258, 270 (per Brandeis, J.) otherwise intimates. But subsequently, in United States v. American Railway Express Co., 265 U.S. 425, 430, n. 3, the Court (again per Brandeis, J.) said: "Paragraph 2 of Section 15 deals only with the time when orders under paragraph 1 take effect."[1]

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[1] This subsection of the Act is set forth under the heading: "Determination of Rates, Routes, etc.; Routing of Traffic; Disclosures (of routing), etc."

It was inserted in the Act by amendment of February 28, 1920, after Interstate Commerce Commissioner Clark had so requested on behalf of the Commission, at hearings on H.R. 4378 before the House Committee on Interstate and Foreign Commerce, held on July 15, 1919, p. 28. The legislative record makes clear that the ICC sought the amendment because of questions relating to the duration of its rate orders.

Under the heading "Power of Commission to Fix Rates," H.R. No. 456 on the Transportation Act of 1920

It is noteworthy that Section 16(6) dealing with the suspension or modification of orders of the Commission contains no clause continuing them in effect until such suspension or modification.

[fols. 863-864] Accordingly, when Alleghany divested itself of the control of all carriers, the order of June 5, 1945,

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states, after a discussion limited solely to rates and routing orders:

> "The amendment also provides that orders of the Commission shall continue in force until its further order in lieu of the existing law which provides that they shall continue in force for not exceeding two years. The existing law provides that the Commission may suspend schedules of rates filed with it for 120 days, and for a further period not exceeding six months."

The 1920 Act amended 15(2) as then existing, and changed it to its present form. In explaining the amendment on the floor of Congress, Chairman Esch of the House Interstate and Foreign Commerce Committee stated:

> "We also change the existing law which requires rates, fares and charges to remain in existence for a period of two years after the determination of the Commission. We provide no limit, believing that it is wiser, to have no fixed limit. Some of the Shreveport cases were pending for practically two years. It is easy to conceive of a case that might continue for almost two years, and if the present law remained in effect it would mean that the rates established after a long and expensive litigation might become operative for a period much less than the two years." 58 Cong. Rec. 8317 (66 Cong. 2d Session).

Moreover, before 1920, there was no separate subsection 2 in section 15. A similar provision was imbedded in a paragraph in Section 15 relating solely to rate regulation and the like, and it would have been difficult to argue that such provision applied to ICC orders issued under other sections of the Act. See 34 Stat. 589; 36 Stat. 551.

became inoperative.[7a] This occurred before the ICC order authorizing Alleghany to issue its new preferred. But, even if we are wrong in this respect, there remains the fact that the ICC, in its "status" order, issued by Division Four on March 2, 1955, and affirmed by the full Commission on May 24, 1955, expressly terminated the June 5, 1945 order so that when, on June 22, 1955 the ICC purported to authorize the issuance of the preferred stock, the June 5, 1945 order had already been explicitly nullified.

Consequently, as Alleghany was not within ICC regulation when it proposed to issue its new preferred stock, the issuance of that stock would violate the Investment Company Act for this reason: The SEC order of October 25, 1945, which terminated Alleghany's registration under the Investment Company Act, ceased to have any effect, at the very latest, on May 24, 1955, and Alleghany was then forthwith within the coverage of the Investment Company Act. Alleghany could not thereafter lawfully issue any new securities because of Section 7 of that Act, 15 U.S.C. Section 80a-7.

[fols. 865-867] Alleghany contends, however, that the SEC order of October 25, 1945, exempted Alleghany from the Investment Company Act; that, to bring Alleghany within the coverage of the Act required another SEC order; and that no such order has been entered. We cannot agree for this reason: Section 3(c)(9) of that Act, 15 U.S.C. Section 80a-3(c)(9), exempts from that Act's provisions any company subject to ICC regulation. The SEC order of October 25, 1945 was but a formal recognition of that exemption, which became operative when the ICC made its order of June 5, 1945, since, by that order, Alleghany became subject to ICC regulation. When, however, at the latest on May 24, 1955, the June 5, 1945 ICC order lost its efficacy, thereupon the SEC order of October 25, 1945 became automatically inefficacious, with the result that Alleghany im-

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[7a] Alleghany, on January 19, 1954, had divested itself of the control of all but one carrier, the United States Trucking Company, which it controlled through its ownership of the stock of the Pittston Company. On May 21, 1954, it ceased to control even that one carrier.

mediately became again subject to the Investment Company Act.[8]

Alleghany cites SEC v. Long Island Lighting Co., 148 F.(2d) 252 (C.A.2), judgment vacated on the ground of mootness, 325 U.S. 833, and In re United Corporation, 128 F. Supp. 725, as authority in support of its contention

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[8] The SEC, in its opinion accompanying its order of October 25, 1945, 20 SEC 731, said that, if Alleghany in the future ceased to be subject to regulation under the ICC Act, "The order may be revoked, suspended, or modified after appropriate notice and opportunity for hearing."

We think that, since that order was not entered in the exercise of the discretion of the SEC, but was entered perforce, this language did not have the effect of excluding Alleghany, when it ceased to be subject to ICC regulation, from the Investment Company Act until a further order of the SEC.

In a memo filed on August 1, 1955, by the SEC with Mr. Justice Harlan on a motion to stay enforcement of our preliminary injunction order, the SEC stated:

> "It will be noted that Section 3(c) of the Investment Company Act states that 'none of the following persons is an investment company within the meaning of this title,' including under subsection (9) thereof a company which is 'subject to regulation under the Interstate Commerce Act.' Such exclusion from the Act is automatic by statutory definition and is not dependent upon an order of the SEC. The SEC order entered in 1945 was made for the purpose of giving formal recognition to that status, since Alleghany had theretofore been registered as an investment company under the statute. Had Alleghany never been registered under the Investment Company Act, a formal order declaring its status would not have been necessary, and its exclusion from the Act would have been *ipso facto* applicable solely by virtue of the assumption of regulatory jurisdiction by the ICC. The effect of the SEC's 1945 order served merely to extinguish the prior registration of Alleghany, and as such Alleghany assumed the position of any other company,

that the October 25, 1945 order of the SEC continued in effect. The Long Island Lighting Company case is inapposite.[9] There the SEC had exercised the discretionary power granted to it under Section 3(a) of the Public Utility Holding Company Act—15 U.S.C. Section 79c(a)—to exempt the company from the registration and regulatory provisions of the Public Utility Holding Company Act. Accordingly, before the company could again be subject to the Public Utility Holding Company Act, it was necessary that the SEC take action authorized by 15 U.S.C. Section 79c(c) to revoke its prior exemption order.[9a] The statute involved in the instant case is materially different from that in Long Island Lighting Company. Here the exemption from the Investment Company Act under Sec-

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such as banks, insurance companies, underwriters, and others automatically excluded by the Congress from the definition of an investment company under Section 3(c). So considered, it may be argued that Alleghany should enjoy no greater privilege or right than that accorded to any other company excluded from regulation under the Investment Company Act. Under this approach, if Alleghany lost its status under Section 3(c)(9) it must effect compliance with the Investment Company Act as a condition of doing business, namely, it must register as an investment company and comply with the various provisions of that Act. Absent registration, Section 7 would prohibit Alleghany from engaging virtually in any transaction in interstate commerce, including the proposed offer of exchange."

[9] See the comment of the Court of Appeals on that case in West India Fruit S.S. Co. v. Seatrain Lines, 170 F.(2d) 775 (C.A.2).

[9a] Morris v. SEC, 116 F. (2d) 896 (C.A.2), also cited by Alleghany, involved a discretionary exemption by the SEC under 3(a)(5) of the Public Utilities Holding Company Act, 15 U.S.C. Section 79c(a)(5), and is distinguishable on the same grounds as the Long Island Lighting Company case.

tion 3(c)(9) was not at all discretionary with the SEC;[9b] [fols. 868-869] the exemption depended upon the fact that Alleghany, controlling carriers, came within ICC regulation through the ICC order of June 25, 1945. As we said above, when that order lost its effect, the SEC order of October 25, 1945 likewise lost its effect.

In re United Corporation, 128 F. Supp. 725, dealt with a contention of preferred stockholders that the district court was without jurisdiction to approve the second half of a plan, under Section 11(e) of the Public Utilities Act, providing for the elimination of option warrants held by the preferred stockholders after the completion of the first part of the plan, which required the sale of subsidiaries in order to transform the company from a public utilities holding company into an investment company. Since a single and unified plan was involved, we think the district court correctly rejected the preferred stockholders' contention. However, we do not agree with the district court's statement that it had jurisdiction because the SEC had not yet made an order terminating its jurisdiction.

3. The previous opinion held that the ICC orders are reviewable and that the plaintiffs have "standing to sue." We adhere to this ruling but modify our discusion to this extent: Defendants rely primarily on New York Central Securities v. United States, 54 F.(2d) 122, affirmed 287 U.S. 12, as authority for their contention that plaintiffs have no such standing. We think that case at most holds that a stockholder cannot, in a suit under the Urgent Deficiencies Act, assert harm to the corporation;[10] it does not hold that he cannot assert a threatened direct harm to

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[9b] Compare 15 U.S.C. Section 80a-6(c) of the Investment Company Act which gives the SEC discretionary power to exempt a company from the Investment Company Act. This section was not involved in the instant case since the termination of Alleghany's registration was based solely upon 15 U.S.C. Sections 80a-3(c)(9) and 80-a-8(f) of the Investment Company Act. See 20 S.E.C. 731.

[10] We need not here consider whether a stockholder could do so derivatively.

himself as a stockholder. Such a threatened harm exists here, since the right to convert the preferred into common stock may dilute the interest of plaintiffs as common [fols. 870-871] stockholders of Alleghany.[11] The fact that all the common stockholders are threatened with harm does not convert an injury, individual to each common stockholder, into an injury to the corporation which cannot be enforced except derivatively. Nor is it relevant that many of the injured common stockholders have approved Alleghany's action and do not choose to oppose it. Since the plaintiffs are threatened with harm as individuals, it suffices that they owned Alleghany stock when they brought suit.

4. The order granting Alleghany carrier status and approving the issuance of the new preferred stock is reviewable under the test enunciated in Rochester Tel. Corp. v. United States, 307 U.S. 125. Rochester held that, when an administrative order causes a plaintiff some individual harm, he may seek review of the administrative action in the courts, but that, until the administrative action causes such harm, no review is possible, since the suit would ask "review of interim steps in a proceeding" and would therefore be premature. Although the plaintiffs perhaps suffered no injury from the ICC order granting Alleghany carrier status, they were surely threatened with serious harm by the second order approving the issuance of the new preferred stock. Thus, while the status order, by itself, may not have been reviewable, nevertheless, once the ICC made its order approving the issuance of the new preferred, there arose a right to seek review of the preferred stock order and also of the status order on which the preferred stock order was based.

5. In the majority opinion on the preliminary injunction, it was held that plaintiffs had shown that they were en-

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[11] Although the common stockholders could not complain about a dilution of their interest by a lawful issuance of convertible preferred approved by the SEC under the Investment Company Act, they may assert, as a direct injury to themselves, a dilution of their shares by an unlawful issuance of stock pursuant to a void ICC order.

titled to injunctive relief. The showing necessary to justify a preliminary injunction is probably greater than that necessary for final injunctive relief. See our opinion on the preliminary injunction; see also Restatement of Torts, Section 933, special note at p. 683, as to "inadequacy," and cf. Section 936(2) and Comment d. It follows that the plaintiffs are entitled to final relief.

[fols. 872-873] 5. The intervening preferred stockholders urge that we should deny this relief because they have changed their position in reliance upon the orders of the ICC.[12] But, as we observed in our previous opinion, any such reliance was upon void orders. The Investment Company Act, and some other statutes relative to the SEC, specifically provide that one who, in good faith, relies on the Commission's "rule, regulation or order" shall be protected from liability imposed by the statute even if later a court holds its invalid.[13] Significantly, the ICC statute contains nothing of the sort.[14]

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[12] These intervening stockholders make much of the fact that they and others like them have invested millions of dollars in the preferred stock, whereas the plaintiffs only own a small amount of common stock. The small amount of stock owned by plaintiffs is irrelevant. See, e. g., Case v. Los Angeles Lumber Co., 308 U.S. 106, 115; Subin v. Goldsmith, 225 F.(2d) 753 at 761 (C.A.2).

[13] The Investment Company Act provides (15 U.S.C. Sec. 80a-37(d)): "No provision of this subchapter and sections 72(a) and 107(f) of Title II imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." For similar provisions in other acts, see 15 U.S.C. Sec. 80b-11(d) (Investment Advisers Act); 15 U.S.C. Section 79t(d) (Public Utility Holding Company Act); 15 U.S.C. Sec. 77sss(c) (Trust Indenture Act).

[14] There is not before us the question whether Alleghany may be liable to preferred stockholders for any loss they may suffer.

6. On the basis of the foregoing, the order approving the issuance of Alleghany's preferred stock must be set aside as null and void. There is no occasion to remand to the Commission since, in the merger proceedings, no further evidence or findings could validate that order. Any future effort by Alleghany to obtain a Commission order approving Alleghany's control of Central, as in the public interest, would require entirely new and independent proceedings; no order entered therein could, retroactively, render valid the Commission's order with reference to Alleghany's preferred stock.

7. Should the Supreme Court hold that our interpretation of 49 U.S.C. Section 5(2)(a)(i) is incorrect, the necessity would arise to consider several matters, many of which were discussed in our previous opinion.[15] For the convenience of the Supreme Court, we have set forth, as point II of the Appendix to this opinion, our findings and conclusions as to those matters, and what would be our alternative disposition of the case.

A judgment will be entered setting aside the Commission's orders with reference to Alleghany under Section 5(2)(a)(i) and also its order with reference to the Alleghany preferred stock. However, on application of the defendants, we will stay the enforcement of our judgment for 30 days to permit them to seek and perfect an appeal to the Supreme Court. All motions for intervention are hereby granted.

[fol. 874] Jerome N. Frank, U.S.C.J., Edward J. Dimock, U.S.D.J., Lawrence E. Walsh, U.S.D.J.

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[15] We grant plaintiffs' motion to amend their complaint to allege that they are suing on behalf of all common stockholders similarly situated. We think the amendment will have no significance, however, unless the alternative basis of decision, set forth in point II of our Appendix, becomes operative. For the amendment will do no more than render the action a spurious class suit and thus allow other common stockholders to joint as plaintiffs, if they so desire. See York v. Guaranty Trust Co., 143 F.(2d) 503, 518 (C.A.2); Dickinson v. Burnham, 197 F.(2d) 973, 978 (C.A.2).

Appendix I

Defendants' present contention, that Alleghany was a necessary party to the proceeding before the I.C.C. for approval of the merger of Big Four and the Bridge Company, is claimed to be based on a consistent and uniform administrative interpretation of clause 5 of Section 5(2)(a) and of the holding of *United States* v. *Marshall Transport Co.*, 322 U.S. 31 (1944). The asserted uniform administrative construction is that a non-carrier holding company again "acquires control" of already controlled subsidiaries or property whenever there is an internal rearrangement within its system of carrier subsidiaries, and that when such an "acquisition of control" occurs, remote parents as well as immediate parents are necessary parties and are required to join in the application under this section.

Actually, the Commission has not been consistent in holding intra-system rearrangements to be acquisitions of control, even by the immediate parent of the rearranged companies; and it has never found such a rearrangement to be an acquisition of control by a parent other than the immediate parent. Further, it has never required a parent [fol. 876] other than the immediate parent to join in the proceeding as a necessary party.

The absence of administrative consistency is most evident in cases involving factual situations similar to the present one, in which the transaction requiring I.C.C. approval was a merger between two subsidiaries of a single parent, or the purchase by one subsidiary of the property and operating rights of another.

In one case the I.C.C. approved the proposed merger without making any finding on the question of acquisition of control or necessity for joinder by the immediate or remote parent of the merged subsidiaries. *Scott Bros., Inc.-Merger*, 45 M.C.C. 196 (1946).[1]

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[1] Scott Bros. and Peninsula, a wholly owned subsidiary of Scott, applied to the I.C.C. for approval of the merger of Peninsula into Scott; the I.C.C. approved the merger and

In another it approved the purchase by one subsidiary of the operating rights and property of another and specifically dismissed their parent's application to "acquire control" as a result of the purchase. *Pratt's Express Co.—Purchase—Security Warehouse Company,* 39 M.C.C. 834 (1944).

[fol. 877] In a third it approved the purchase by one subsidiary of the operating rights of another, found an acquisition of control by the buyer's immediate parent, but made no finding that the immediate parent or the remote parent of the system were necessary parties. *United Parcel Service of Portland—Purchase—Wiese,* 37 M.C.C. 473 (1941).[2]

In a fourth it approved the purchase by one subsidiary of the operating rights and property of another, but made no specific finding that the parent of the combined subsidiaries (whose presence in the proceeding was required for approval of another transaction), acquired control of the combined subsidiaries as a result of the purchase. *Chesapeake & O. Ry. Co. Purchase,* 261 I.C.C. 239 (1945).[3]

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authorized the "acquisition of control" of Peninsula by Scott. It failed to find an acquisition of control by Scott's parent, American Co., or by Pennsylvania Railroad, American's parent and the ultimate parent of the system, or to require their presence as necessary parties.

[2] United Parcel Service of Portland, a subsidiary of United Parcel of Nevada, which was in turn a subsidiary of United Parcel of Delaware, sought to purchase the operating rights of one Wiese. Previously Wiese had operated under Portland's control by contract: he was an officer of Portland, leased his trucks from it, and his rent and income were so fixed that he had neither profit nor loss. After the proposed sale Wiese would no longer operate his business independently. The I.C.C. found an acquisition of control by Nevada as well as by Portland. It found no acquisition of control, however, by Delaware and did not require the presence of either Nevada or Delaware as necessary parties.

[3] The I.C.C. approved, retroactively, the acquisition of control of Chesapeake & Ohio, Nickel Plate and Pere Marquette by Alleghany under Section 5(2). It also approved

[fol. 878] Finally, in two cases, it found an acquisition of control and a necessity for joinder by the immediate parents of the merged subsidiaries. *Pere Marquette Ry. Co. Merger*, 267 I.C.C. 207 (1947);[4] *Standard Freight Lines, Inc.—Merger*, 40 M.C.C. 41.[5]

These decisions reveal nothing more than that the Commission has been inconsistent in determining whether a merger or similar combination between two subsidiaries of a single parent constitutes an acquisition of control by the immediate parent of the combined subsidiaries, and whether the immediate parent is a necessary party to the proceeding in which approval is sought for the combination. They fail altogether to support defendants' contention that a more remote parent "acquires control" or is a necessary party to such a proceeding.[6] In fact, in the only two cases in which the parent of the merging subsidi- [fol. 879] aries also had a parent, United Parcel, in which the remote parent was a non-carrier, and Scott Bros., in which the remote parent was a carrier, the Commission failed to find an acquisition of control or a necessity for

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a purchase of the property and operating rights by the C. & O. of its subsidiary, Norfolk Terminal. C. & O. already controlled the Norfolk by stock ownership and lease. Alleghany joined in C. & O.'s petition for I.C.C. approval of the purchase of Norfolk Terminal. The I.C.C. made no finding that Alleghany acquired control as a result of Norfolk's purchase by C. & O. Nor does the Commission's opinion suggest that Alleghany would have been a necessary party to that application.

[4] Merger of a subsidiary in the third tier of the holding company hierarchy into a subsidiary in the second tier, thus putting the combined subsidiaries under the direct control of the parent.

[5] The I.C.C. held that Chaddick, an individual, acquired control and was a necessary party to a proceeding for approval of a merger between two subsidiaries, both already controlled by him through stock ownership.

[6] Here Central is the immediate parent of the merging subsidiaries, not Alleghany. Alleghany claims to control Central.

joinder of the parent's parent. In no case has the Commission seen fit to explain or reconcile its conflicting decisions.

The other cases relied on by defendants to support the claimed uniform administrative interpretation of Section 5(2)(a) and the *Marshall* case involved fact situations which make them inapplicable to the present case.

Thus, where a parent has acquired direct control of a subsidiary by purchase of its stock from an intermediate subsidiary, the Commission has uniformly regarded the purchase as an "acquisition of control". *Atchison, T. & S.F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M.C.C. 469 (1938); *Warrior & Gulf Nav. Co. Control*, 250 I.C.C. 26 (1941); *Wheeling and L. E. Ry. Co. Lease*, 271 I.C.C. 713, (1949); *Kittrell—Control—Dixie Motor Coach Corp.*, 37 M.C.C. 91 (1941). As vendee, the parent in each of these cases would, of course, be one of the two active participants to the transaction, and a necessary party to the proceeding for approval. Inasmuch as Alleghany has not sought to purchase the stock of any of its subsidiaries, these cases are not applicable.

[fol. 880] The Commission has also held that where one company, which controls another to a limited extent, acquires an additional or tighter form of control, it has "acquired control" within the meaning of Section 5(2)(a). *Union Belt Ry. of Oakland Control*, 271 I.C.C. 223 (1948).[7] *Control of Big Four by New York Central*, 72 I.C.C. 96 (1922).[8] But these cases are not applicable here, because Alleghany's control of its subsidiaries is not one bit more complete than it was before the merger.

Defendants apparently do not contend that the applica

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[7] Southern Pacific sought I.C.C. approval to acquire control of Union Belt by purchasing its stock, although it already controlled its properties by lease.

[8] New York Central, already owning a majority of the common stock, sought permission under Section 5(2) to acquire preferred stock in the Big Four. Consent of the majority of the preferred was required for certain transactions, and the Commission therefore regarded the acquisition of the preferred stock as an acquisition of control.

tion for permission for Central to lease the properties of the Bridge Company, which was also submitted to the Commission, constitutes an acquisition of control by Alleghany. In any event, such a claim would be misplaced. Where there is already complete stock control of the components of a system, their over-all control does not depend upon intrasystem leases. And the Commission has not expressed any support for such a claim. In *Nicholas, Fayette &* [fol. 881] *Greenbrier R. Co. Lease*, 261 I.C.C. 546 (1945), it held that parents acquire control as a result of the joint lease of property of a jointly owned subsidiary.[9] This holding, whether defensible or not in cases of subsidiaries held by more than one carrier, as to which a lease could work a shift of power between the two holding companies, has no applicability to the present case which only involves wholly owned subsidiaries of a single holding company. In *Industrial Transport, Inc.—Lease, Jenks*, 39 M.C.C. 823 (1944), the only case of a lease within such a wholly owned system, the Commission held that a parent who leased his own properties to one of his subsidiaries did not, through the subsidiary, acquire control of what he already owned.

The remaining cases cited by defendants have no apparent relation to the facts of the present case. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508 (1923).[10] [fol. 882] *Carey & Beveridge—Control—Commercial Car-*

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[9] The I.C.C. held that Alleghany, as the parent of C. & O. was a necessary party to an application by C. & O. and New York Central to lease an extension of the Greenbrier, a carrier which C. & O. and Central already controlled by stock ownership.

[10] The I.C.C. granted Southern Pacific authorization to acquire control by lease and stock ownership of Central Pacific, even though it already had such control. The Supreme Court, however, had just found its control in violation of the anti-trust laws, and ordered divestiture. Southern Pacific therefore sought to acquire lawful control by I.C.C. approval which would exempt it from the provisions of the anti-trust laws.

riers, Inc., 45 M.C.C. 165 (1946).[11] *Genesee Falls Ry. Co. Control*, 212 I.C.C. 637 (1936).[12]

Finally, defendants' contention, that an order under Section 5(3) may be entered by the I.C.C., when it has found an "acquisition of control" as a result of an alteration in the form of control, is unsupported. No court has so held. Neither has the I.C.C., although in two cases the Commission assumed it had such power without attempting to exercise it. In *Warrior & Gulf Nav. Co.—Control, supra.*, it declined to enter such an order as a matter of discretion; and in *Nicholas, Fayette & Greenbrier R. Co. Lease, supra.*, it declined because Alleghany was already considered a carrier under an order entered in a prior [fol. 883] case. In *Chesapeake & O. Ry. Co. Purchase, supra.*, also relied on by defendants, the I.C.C. did not appear to base its application of Section 5(3) to Alleghany on the latter's application for approval of the purchase of the property of Norfolk Terminal, its already held subsidiary. Rather, the applicability of Section 5(3) was based upon retroactive approval of Alleghany's acquisition of control of the C. & O., Nickel Plate and Pere Marquette.

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[11] Previously, Carey, Beveridge and one Travers had owned two carriers. Carey and Beveridge acquired Travers' interests in both. In effect the Commission held there was an acquisition of control by Carey and Beveridge which had not previously existed and which required I.C.C. approval under Section 5(2).

[12] New York Central applied for I.C.C. authorization to acquire 100% of the stock of Genesee Falls Ry. and to merge that corporation into Central. Central already owned "about half" of Genesee's stock. The balance which was substantially valueless, was owned by several of its customers. The I.C.C. approved the merger and authorized the acquisition of control of Genesee by Central by acquisition of all its capital stock. There was no finding that Central's ownership of stock before the proposed transaction had enabled it to control Genesee.

The opinion on the application for a preliminary injunction departed too far from reality in taking the position that the application to the ICC implied a request that it pass on the propriety of Alleghany's control of the Central. We believe that the ICC had no appropriate application before it for a determination of the question of control. The case cannot, therefore, be remanded for such a determination.

If we are wrong, however, in this holding that the ICC is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) whether such control is in the public interest.

The ICC's orders purported to determine the question of control of Central but that determination cannot stand (a) because the findings as to Alleghany's control of Central are insufficient, (b) because the evidence does not support those findings, and (c) because plaintiffs were deprived of an evidentiary hearing on that issue of control. We have little to add to the treatment of those questions in the opinion on the motion for a preliminary injunction.

1. In additional support of our determination that the opinions of the ICC are defective, in that ultimate facts to support their conclusions are not found therein, we cite, Baltimore & Ohio R. Co. v. U.S., 22 F. Supp. 533, 537 (D.C.N.Y.) and M. & M. Transportation Company v. United States, 128 F. Supp. 296, 298-9 (D.C. Mass.).

2. To our discusison of the failure to give an evidentiary hearing we add the following:

The ICC Rules of Practice (see last volume of 49 U.S.C.A. —i.e., Sec. 301 to end—p. 439 et seq.) contemplate an evi- [fol. 885] dentiary hearing on oral argument, or by deposition, except in a "shortened" or "modified" proceeding. See Rules 5(j) and (k), 44, 44(b), 45(b), 50, and 74. Nothing in the record shows that here the proceeding was "shortened" or "modified" in the manner provided in Rules 44 and 45(b).

Rule 19 provides that "facts in a pleading filed prior to oral hearing should "constitute evidence . . . unless specifi-

cally denied in a counter-pleading." If the intervenors "specifically denied" facts alleged in Alleghany's application, they were entitled to a hearing on oral evidence or depositions as to such denied facts. As an example of such a specific denial we note plaintiff Breswick's statement in its amended petition of February 18, 1955, that "Alleghany Corporation is not in control of * * * the New York Central." This specifically denies the statement in Alleghany's application that it "recently * * * acquired control of the Central."

Section 5(2)(b) provides that the Commission "shall afford reasonable opportunity for interested parties to be heard." Section 17(3) provides that all hearings "shall be public upon the request of any party interested." Section 5(2)(b) provides that "if the Commission shall consider it necessary . . . , it shall set aside said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved, unless the Commission determines that a public hearing is not necessary in the public interest." As Alleghany admits (in printed brief) Sec. 17(3) indicates that there may be hearings that are not "public." But Alleghany argues that Sec. 5(2)(b) is an exception to Sec. 17(3), because the former gives the Commission discretion. However, assuming, arguendo, that Sec. 17(3) does not deprive the Commission of discretion under Sec. 5(2)(b)—i.e., discretion [fol. 886] not to hold a public hearing even if one is requested by interested parties—it still seems true that there can be a non-public hearing under Sec. 5(2)(b) at which "interested parties" must have a "reasonable opportunity to be heard."

FCC v. WJR, 337 U. S. 265, related, not to the presentation of evidence, but solely to the oral argument of legal questions. Moreover, the FCC statute, 47 U.S.C. Sec. 312(b), did not provide for an "opportunity to be heard," but only for "reasonable opportunity to show cause." In addition, even as to oral argument, the Supreme Court (pp. 275-276) noted that, "in some situations," such an oral argument is essential to a fair hearing. A "situation" which involves the very jurisdiction of the Commission would seem to be such a situation.

It is true that plaintiffs were not entitled to an evidentiary hearing if they did not own Alleghany stock when they sought to intervene. However, Breswick & Co. alleged such ownership in their petition for intervention and this was not denied by Alleghany in its answer. We feel that we ought not to go behind the ICC record.

3. The ICC opinions were further defective in their failure to find that the acquisition by Alleghany of control of the Central was consistent with the public interest. It is provided, 49 U.S.C. § 5(2)(b), that the ICC's approval shall be given if it finds that "the proposed transaction * * * will be consistent with the public interest."

The fact that the statute contemplates consideration of a "proposed" transaction does not mean that a consummated, though unauthorized, transaction must be accepted as legitimate. The ICC, when asked to approve a past acquisition made without ICC approval, will deny the retro- [fol. 887] active approval except perhaps where the "illegal" past acquisition was made in good faith. See Bingler case, 7 Fed. Carriers Cases, No. 31869, p. 605 at 606.

The finding of public interest is of very real importance. It has been held to include the following factors: Adequacy of transportation, economy and efficiency effected by the change, necessity and appropriateness of the change in serving the public need, maintenance of desirable competition, avoidance of hampering restrains. Schwabacher v. United States, 334 U.S. 182, 193-4; New York Central Securities, 287 U.S. 12, 24-6; United States v. Lowden, 308 U.S. 225, 230; Standard Oil v. United States, 337 U.S. 293, 311.

In Weinstein-Control-Capital Transit & Montgomery Bus Lines, 56 MCC 127, 134, Division 4, (Mahaffie, Rogers and Patterson) held that the fitness of the person acquiring control, financially and otherwise, was a proper factor for consideration.

Prior violations of the Act were considered in § 5(2) applications in Marcell-Purchase-Flemings, 39 MCC 5. (This factor has also been taken into account in connection with merger applications.) Zeffrin Truck Lines, Inc.-

Merger, 37 MCC 33; Hankenson-Control-Mutual Trucking, 37 MCC 617.

Public interest would undoubtedly include other factors if the circumstances required. For example the ICC might well conclude that a proposed acquisition by a foreign government was not in the public interest.

We consider sound the authorities cited by Division 4, and in the opinion on the preliminary injunction in support of the holding that such a finding must be made. Allegheny's attempted distinction does not stand-up. The two cases on which it relies are Weinstein-Control-Capital Transit & Montgomery Bus Lines, supra., and Seaboard [fol. 888] Airline Ry. Co. Receivership, 261 ICC 689. It is said that the former relates to a motor carrier and motor carriers in order to obtain a certificate of public convenience and necessity under §§ 306-307 must be found "fit, willing and able properly to perform the service proposed" whereas there is no such requirement in the case of rail carriers. This observation is true but irrelevant. The holding in the Weinstein case was in no sense based upon §§ 306 and 307. The only section under discussion was the same one before us now, § 5(2). Similarly, an attempt is made to distinguish the Seaboard case because one of its subsidiaries was a water carrier. This fact may be true, but again that was in no way the basis for the ICC determination and it is not commented on in connection with the holding that acquisition of control of a previously combined system required ICC approval under § 5(2).

An additional case supporting the need for this finding is Arkansas & L. M. Ry. Co. Control, 282 ICC 254, Division 4, (Mahaffrie, Rogers and Mitchell). In that case a corporation acquired four small rail carriers previously owned directly or indirectly by the selling corporation. Its acquisition was held to require ICC approval (p. 260). Further the individuals who, by a voting trust, controlled the acquiring corporation were also held to be in indirect control of the four carriers and therefore approval of their acquisition was necessary (p. 263).

[fol. 889] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & COMPANY, et al., Plaintiffs,

v.

UNITED STATES OF AMERICA, et al., Defendants

Before: Frank, Circuit Judge, and Dimock and Walsh, District Judges.

SUPPLEMENTAL OPINION—December 23, 1955

In our opinion of November 18, 1955, we neglected to say that the temporary injunction against Alleghany would be made permanent. That is, however, our direction. Nevertheless we must consider how much, if any, of our order should be stayed pending appeal.

The temporary injunction, among other things, enjoined Alleghany, its transfer agents, officers, directors, servants or employees from transferring the new 6% preferred stock. That part of it was stayed by Mr. Justice Harlan, pending appeal, insofar as it related to the 900,000 shares of preferred stock already issued. In deference to him we similarly stay the corresponding part of our final injunction pending appeal.

For obvious reasons, we will not stay any of the rest of the injunction against Alleghany, its transfer agents, officers, directors, servants or employees.

We need not, and do not, now consider the legal consequences, if any, of the transfers of new preferred stock which occurred after the issuance, by Justice Harlan, of a partial stay of this Court's preliminary injunction. Should [fol. 890] the Supreme Court reverse our final order, consideration of that matter will not be necessary; should there be no appeal from our order, or if the Supreme Court should affirm our order, we will, unless the Supreme Court otherwise directs, consider the matter on the application of the plaintiffs or intervenor-plaintiffs.

At New York, N. Y. in said district, on December 23, 1955.

Jerome N. Frank, United States Circuit Judge; E. J. Dimock, United States District Judge; Lawrence E. Walsh, United States District Judge.

[fol. 891] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BEESWICK & Co., et ano., etc., Plaintiffs,

against

UNITED STATES OF AMERICA, et al., Defendants

MEMORANDUM DENYING ALLEGHANY'S MOTION FOR NEW TRIAL—January 27, 1956

PER CURIAM

This is a motion by defendant Alleghany Corporation to set aside a judgment and for a new trial upon the strength of evidence newly presented to the court.

The assailed judgment, among other things, set aside (a) orders of the Interstate Commerce Commission insofar as they determined that Alleghany Corporation was in control of The New York Central Railroad and insofar as they determined that Alleghany Corporation should be considered as a carrier subject to the provisions of section 20 (1) to (10) inclusive and section 20a (2) to (11) inclusive of the Interstate Commerce Act and (b) orders of the I.C.C. authorizing issuance of 6% convertible preferred stock. As a ground for our conclusion of the invalidity of the determination that Alleghany Corporation should be considered as a carrier, we pointed out that the action [fol. 892] of the I.C.C. relied upon as having that effect was the approval of a merger of the Louisville & Jeffersonville Bridge & Railroad Co. into The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as "the

Big Four." These two carriers were already controlled by the New York Central. In turn Alleghany claimed that it controlled the New York Central. Alleghany was not actually a carrier but sought status as a carrier by virtue of Interstate Commerce Act, § 5(3), 49 U.S.C. § 5(3), which provides that, whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of the same section to acquire control of a carrier or carriers, "such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier * * *." We held that, since the I.C.C. approved only a merger of carriers already controlled by a single parent, no acquisition of control was involved and the I.C.C. had no jurisdiction, by virtue of its approval of the merger, to provide that Alleghany should be considered as a carrier.

Since the I.C.C.'s power to authorize the issuance of the preferred stock depended upon the existence of a valid order authorizing Alleghany to acquire control of a carrier or carriers and providing that it be considered as a carrier, we set aside the orders authorizing the issuance of the preferred stock.

The matter which Alleghany now, for the first time, presents to us as a basis for setting aside our judgment is an order of the I.C.C. in Boston and Albany Railroad Company, et al. Control, Finance Docket 18789, decided March 22, 1955. That proceeding, it is said, involved new acqui- [fol. 893] sition of subsidiaries of the New York Central, rather than mere merger, so that an order authorizing that acquisition might validly have provided that Alleghany should be considered as a carrier. The order actually entered contained no such provision. It was, however, entered prior to the orders authorizing the issuance of the preferred stock so that, as far as chronology is concerned, it might have lent support to the I.C.C.'s power to make those orders of approval.

While the cause of the omission from the Boston and Albany order of a provision that Alleghany should be considered as a carrier may perhaps have been the belief of the I.C.C. that there was a valid outstanding order to that effect in the proceeding here under review, that does not alter the fact that the Boston and Albany order contained

no such provision. Without a direction that the non-carrier shall be considered as a carrier the authorization of the acquisition of a carrier does not create that status. Section 5(3) merely provides that the authorization shall create that status "to the extent provided by the Commission in such order." The plain meaning of the statute that, no matter how eligible may be the controlling corporation, status as a carrier shall be conditioned on a provision to that effect in the order, has been recognized by the I.C.C. In Warrior & Gulf Nav. Co. Control, 250 I.C.C. 26, the I.C.C. says in so many words, p. 28, that the United States Steel Corporation, by the transaction authorized, "unquestionably will acquire control of the company"; it nevertheless concludes, p. 32, that it will not include any provision that the steel corporation shall be considered as a carrier since it perceives no reason for its regulation under the Interstate Commerce Act. [fol. 894]

Thus the Boston and Albany order gave no validity to any of the orders set aside by our judgment. If the judgment was correct in the light of the information before us when it was rendered, it is still correct. The existence of the Boston and Albany order in its present form does not change the legal situation.

We presume that what we are really asked to do is to vacate our judgment and hold proceedings in abeyance while Alleghany applies to the I.C.C. for an amendment of the Boston and Albany order so as to contain a direction that Alleghany shall be considered as a carrier. Even if such an amendment should be obtained nothing would be settled since, for example, difficult questions would arise as to the effect of such an amendment on preceedings taken before its accomplishment.

We are advised that a prompt appeal to the Supreme Court is contemplated and our view is that the ends of justice will be better served by an immediate and authoritative determination of the questions raised in the existing record than by a delayed and doubtful nunc pro tunc repair job.

There remains the possibility that Alleghany may wish to take, concurrently with the appeal, proceedings in the Boston and Albany case before the I.C.C. in order to obtain

determinations there that Alleghany is in control of New [fols. 895-896] York Central and that that control is in the public interest.

We express no view as to the propriety of such a course. It may be that the Boston and Albany case does not really involve an acquisition of control or that there are other reasons which render the course improper or impracticable. We do emphasize, however, that if authorization of Alleghany's control of Central is to be considered in connection with the Boston and Albany case that proceeding must be so conducted that this issue is not subordinated. This means that applications to intervene, pleadings, testimony, and findings with respect to this issue must receive the same full consideration which would be given if it were the sole application before the Commission.

Alleghany moves in the alternative that the judgment be amended so as to lift the prohibition therein contained against the carrying out of the offer to exchange the new preferred stock. We see no reason for modifying the decision which we reached after careful consideration of all of the arguments now advanced.

Both motions are denied.

Dated: January 27, 1956.

Jerome N. Frank, U. S. C. J.; E. J. Dimock, U. S. D. J.; Lawrence E. Walsh, U S. D. J.

[fol. 897] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & Co., et ano., etc., Plaintiffs,

against

UNITED STATES OF AMERICA, et al., Defendants

MEMORANDUM DENYING MOTION OF BAKER, WEEKS & Co., ET AL FOR REARGUMENT—Jan. 27, 1956

PER CURIAM

Defendants Baker, Weeks & Co., et al., have moved for reargument of this case.

Only one of the points raised in the elaborate brief submitted in support of the motion requires comment. In that case the earnestness with which defendants' position is advanced leads us to take note of it. It is said that New York Central Securities Corp. v. United States, D.C.S.D.-N.Y., 54 F. 2d 122, affd. 287 U.S. 12, stands for the proposition that, where a parent corporation which has theretofore controlled a subsidiary by virtue of stock ownership modifies the form of control by entering into a lease of the properties of the subsidiary, the transaction constitutes an acquisition of control within the terms of Interstate Commerce Act § 5(3), 49 U.S.C. § 5(3). Suffice it to say [fols. 898-900] that in the New York Central Securities case the court dealt with section 5(2) of the Transportation Act of 1920, 49 U.S.C. § 5(2), which did not distinguish between transactions which did and did not constitute acquisitions of control.

The statute here involved, Interstate Commerce Act, § 5(2), 49 U.S.C. § 5(2), draws just that distinction and classifies transactions between those which are mere mergers, leases, etc. and those which involve the acquisition of control. It is only those transactions which involve the the acquisition of control which may form the basis for an

order under section 5(3) that a person not a carrier shall be considered as a carrier.

The motion for reargument is denied.

Dated: January 27, 1956.

Jerome N. Frank, U.S.C.J.; E. J. Dimock, U.S.D.J.; Lawrence E. Walsh, U.S.D.J.

[fol. 901] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRESWICK & COMPANY, ET AL., Plaintiffs,

against

UNITED STATES OF AMERICA, ET AL., Defendants

Before: Frank, Circuit Judge, and Dimock and Walsh, District Judges.

SECOND SUPPLEMENTAL OPINION—January 27, 1956.

In footnote 7a to our opinion of November 18, 1955, to which this is a supplement, we made a statement indicating that Alleghany controlled United States Trucking Company until May 21, 1954. We made this statement out of abundant caution on the strength of information to that effect in a letter from one of the parties. Another of the parties now states that what we said in the footnote was misleading. The statement in our footnote had no effect upon our decision and does not constitute a finding of fact or conclusion of law.

At New York, N. Y. in said district, on January 27, 1956.

Jerome N. Frank, United States Circuit Judge, E. J. Dimock, United States District Judge, Lawrence E. Walsh, United States District Judge.

[fol. 902] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1955

No. 692

ALLEGHANY CORPORATION, ET AL., Appellants,

vs.

BRESWICK & Co., ET AL., as Common Stockholders of Alleghany Corporation, etc.

ORDER NOTING PROBABLE JURISDICTION—April 23, 1956

Appeal from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

On consideration of the motions of Adelaide Neuwirth and Joseph S. Gruss et al. for leave to join in the jurisdictional statement of Alleghany Corporation, it is ordered that the said motions be, and they are hereby, granted.

On consideration of the motions of appellants to advance this cause, it is ordered that the said motions be, and they are hereby, denied.

[fol. 903] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 82 and 114

BAKER, WEEKS & CO., ET AL., Appellants,

vs.

BRESWICK & CO., ET AL.;

and

INTERSTATE COMMERCE COMMISSION, Appellant

vs.

BRESWICK & COMPANY, ET AL.

Appeals from the United States District Court for the Southern District of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1956

The statements of jurisdiction in these cases having been submitted and considered by the Court probable jurisdiction is noted. The cases are consolidated with No. 36 and total of three hours is allowed for oral argument.

October 8, 1956.